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In the Supreme Court of the United States

OCTOBER TERM, 1975

G. M. LEASING CORP., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional and statutory provisions involved	2
Statement	3
Summary of argument	17
Argument:	
I. The warrantless seizure by the Secretary of the Treasury of property of a delinquent taxpayer, pursuant to levy under Section 6331(a) of the Internal Internal Revenue Code, does not violate the Fourth Amendment	21
A. Introduction	21
B. This Court has upheld the validity under the Fourth Amendment of warrantless seizures of the property of delinquent taxpayers	30
C. Long before the adoption of the Fourth Amendment, delinquent taxpayers in England and America were subject to warrantless seizures of their property in aid of the collection of taxes	40
D. The Fourth Amendment was not intended to limit the Treasury's power to make warrantless seizures of property of delinquent taxpayers	49

Argument—Continued Page

E. The reasons for requiring a warrant prior to an investigative search are inapplicable to the seizure of the taxpayer's property in this case ... 61

F. The conduct of the revenue agents in executing the levy and seizure in this case was reasonable ... 72

II. At all events, petitioner is not entitled to the relief it seeks ... 76

Conclusion ... 82

Appendix A ... 1a

Appendix B ... 11a

Appendix C ... 16a

Appendix D ... 18a

CITATIONS

Cases:

Abel v. *United States*, 362 U.S. 217 ... 50-51, 54, 75

Bellis v. *United States*, 417 U.S. 85 ... 67

Berger v. *New York*, 388 U.S. 41 ... 65

Bivens v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 ... 80

Boyd v. *United States*, 116 U.S. 616 ... 17, 30, 32, 33, 36, 59

Bull v. *United States*, 295 U.S. 247 ... 24, 38

Burton v. *Wilkinson*, 18 Vt. (3 Washburn) 186 ... 43

Cady v. *Dombrowski*, 413 U.S. 433 ... 34, 61

Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 ... 36

Cases—Continued Page

Camara v. *Municipal Court*, 387 U.S. 523 ... 61, 66, 67, 68

Camden County Beverage Co. v. *Blair*, 46 F.2d 648 ... 38

Cancino v. *United States*, 451 F.2d 1028 ... 78

Cardwell v. *Lewis*, 417 U.S. 583 ... 34

Carlo v. *United States*, 286 F.2d 841, certiorari denied, 366 U.S. 944 ... 78

Carroll v. *United States*, 267 U.S. 132 ... 34

Centracchio v. *Garrity*, 198 F.2d 382, certiorari denied, 344 U.S. 866 ... 79

Chakejian v. *Trout*, 295 F. Supp. 97 ... 79

Chambers v. *Maroney*, 399 U.S. 42 ... 34

Cheatham v. *United States*, 92 U.S. 85 ... 38

Colonnade Catering Corp. v. *United States*, 397 U.S. 72 ... 69, 70, 71

Commissioner v. *Shapiro*, No. 74-744, decided March 8, 1976 ... 39

Coolidge v. *New Hampshire*, 403 U.S. 443 ... 32, 64, 67

Cooper v. *California*, 386 U.S. 58 ... 34

Crosby v. *United States*, 496 F. 2d 1384 ... 38

Curtis v. *Hubbard*, 4 Hill 437 (N.Y. Sup. Ct.) ... 43

Davidson v. *New Orleans*, 96 U.S. 97 ... 34

Davis v. *United States*, 328 U.S. 582 ... 36, 75

Enochs v. *Williams Packing Co.*, 370 U.S. 1 ... 39

Entick v. *Carrington*, 19 Howell's State Trials 1029 ... 33

Erskine v. *Hohnbach*, 14 Wall. 613 ... 33

Field v. *United States*, 263 F.2d 758, certiorari denied, 360 U.S. 918 ... 78

French v. *Barber Asphalt Paving Co.*, 181 U.S. 324 ... 34

Cases—Continued

	Page
Fuentes v. *Shevin*, 407 U.S. 67	39
Ginsberg v. *United States*, 408 F.2d 1016	78
Goldstein v. *United States*, 316 U.S. 114	
Graham v. *duPont*, 262 U.S. 234	38
Griffiths v. *Commissioner*, 308 U.S. 355	25
Groves v. *Bloxom*, 3 Houst. 544 (Del. Super. Ct.)	43
Haffin v. *Mason*, 15 Wall. 671	33
Haggerty v. *Wilber*, 16 Johns. 286, 8 Am. Dec. 321 (N.Y.)	43
Hale v. *Henkel*, 201 U.S. 43	67
Higgins v. *Smith*, 308 U.S. 473	25
Hill v. *United States*, 346 F.2d 175	79
Hodder v. *Williams*, [1895] 2 Q.B. 663	43
Hogan v. *Ingle*, 12 Fed. Cas. 311 (No. 6,583) (C.C. D.C.)	38
Hooker v. *Smith*, 19 Vt. (4 Washburn) 151	43
Hunsucker v. *Phinney*, 497 F.2d 29, certiorari denied, 420 U.S. 927	79
Johnson v. *United States*, 333 U.S. 10	32, 64
Keith v. *Johnson*, 31 Ky. (1 Dana) 604	42, 43
King, The v. *Ford*, 4 Nev. and Manning 451 (K.B., 1835)	42
Laing v. *United States*, No. 73-1808, decided January 13, 1976	24, 39
Leigh v. *Green*, 193 U.S. 79	34
Marron v. *United States*, 275 U.S. 192	65
Mason v. *Rollins*, 16 Fed. Cas. 1061 (No. 9,252) (C.C. N.D. Ill.)	38
Meador, In re, 16 Fed. Cas. 1294 (No. 9,375) (N.D. Ga.)	38
Meister v. *United States*, 397 F.2d 268	79

Cases—Continued

	Page
Miller v. *United States*, 357 U.S. 301	43, 75
Mitchell v. *W. T. Grant Co.*, 416 U.S. 600	39
Murray's Lessee v. *Hoboken Land and Improvement Co.*, 18 How. 272	17, 30, 32, 34, 38, 40, 41, 48, 53, 81
New Hampshire Fire Insurance Co. v. *Scanlon*, 362 U.S. 404	34, 39
O'Reilly v. *United States*, 486 F. 2d 208, certiorari denied, 414 U.S. 1043	37
Palmer v. *McMahon*, 133 U.S. 660	34, 41
Paxton's Case, Massachusetts Reports (Quincy) 51	56
Penton v. *Brown*, 1 Keble 698, 83 Eng. Rep. 1193	43
Phelps v. *United States*, 421 U.S. 330	22, 33
Phillips v. *Commissioner*, 283 U.S. 589	38-39, 40
Plisco v. *United States*, 306 F. 2d 784, certiorari denied, 371 U.S. 948	38
Preston v. *United States*, 376 U.S. 364	61
Psaty v. *United States*, 442 F. 2d 1154	38
Reading v. *Chew*, 3 Gt. Br. Tax Cas. 625	42
Roberts v. *United States*, 363 F. Supp. 37	79
Sabbath v. *United States*, 391 U.S. 585	75
Sandnes' Sons, Inc. v. *United States*, 462 F.2d 1388	39
Scheuer v. *Rhodes*, 416 U.S. 232	80
Schmerber v. *California*, 384 U.S. 757	61
Scottish Union and National Insurance Company v. *Bowland*, 196 U.S. 611	34
See v. *City of Seattle*, 387 U.S. 541	66, 67, 73
Semayne's Case, 3 Coke's Rep. (Fraser ed.), Part V, fol. 91a, 77 Eng. Rep. 194 (K.B., 1604)	42, 43, 75

Cases—Continued

	Page
Springer v. *United States*, 102 U.S. 586	34
State v. *Marshall*, 100 Miss. 626, 56 So. 792	38
State Railroad Tax Cases, 92 U.S. 575	38
State ex rel. McPherson v. *Beckner*, 132 Ind. 371, 31 N.E. 950	43
Sutton v. *Allison*, 47 N.C. (2 Jones Law) 339	43
Syndacker v. *Brosse*, 51 Ill. 357	42, 43
United States v. *Aetna Life Ins. Co.*, 46 F. Supp. 30	71
United States v. *Bisceglia*, 420 U.S. 141	22, 23
United States v. *Biswell*, 406 U.S. 311	33, 69, 71
United States v. *Cooper*, 464 F.2d 648, certiorari denied, 409 U.S. 1107	3
United States v. *Di Re*, 332 U.S. 581	55
United States v. *Heck*, 499 F.2d 778	39
United States v. *Hess*, 26 Fed. Cas. 295 (No. 15,358) (C.C. D. Ore.)	33
United States v. *Lewis*, 385 U.S. 206	67
United States v. *McCormick*, 502 F. 2d 281	37
United States v. *McKinnon*, 426 F. 2d 845, certiorari denied, 400 U.S. 868	37
United States v. *Plastic Electro-Finishing Corp.*, 313 F. Supp. 330, affirmed *per curiam*, C.A. 2, No. 35,227, March 23, 1971	25
United States v. *Rexach*, 482 F. 2d 10, certiorari denied, 414 U.S. 1039	38
United States v. *Stout*, 434 F. 2d 1264	37
United States v. *Troiano*, 365 F. 2d 416, certiorari denied, 385 U.S. 958	37

Cases—Continued

	Page
United States v. *Trotta*, 401 F. 2d 514, certiorari denied *sub nom. Genovese* v. *United States*, 394 U.S. 908	37
United States v. *Watson*, No. 74-538, decided January 26, 1976	51, 54
United States v. *White*, 488 F. 2d 563	37
Vanden Bogert v. *May*, 334 Mich. 606, 55 N.W.2d 115	42
Warden v. *Hayden*, 387 U.S. 294	61
Welsh v. *United States*, 220 F.2d 200	78
Wyman v. *James*, 400 U.S. 309	65
Yazoo & M.V.R.R. Co. v. *Clarksdale*, 257 U.S. 10	32

Constitutions and statutes:

Constitution of the United States:	
Article I, Section 8	2, 49, 1a
Fourth Amendment	*passim*, 1a
Constitution of Massachusetts — 1780, Declaration of Rights, Article XIV	44
Constitution of Pennsylvania—1776, Declaration of Rights, Article X	46
Act of July 31, 1789, c. 5, 1 Stat. 29 *et seq.*:	
Secs. 12, 26, 27	50
Sec. 24	53
Act of August 4, 1790, c. 35, Secs. 27, 28, 50, 1 Stat. 145, 163-164, 170	50
Act of March 3, 1791, c. 15, Sec. 23, 1 Stat. 199, 204	50
Act of July 14, 1798, c. 75, Sec. 9, 1 Stat. 597, 600	51
Act of July 1, 1862, c. 119, Secs. 19-22,	

Constitution and statutes—Continued	Page
Act of July 22, 1813, c. 16, Secs. 21, 22, 3 Stat. 22, 30-31	51
Act of December 21, 1814, c. 15, Sec. 5, 3 Stat. 152, 154	51
Act of January 9, 1815, c. 21, Sec. 26, 3 Stat. 164, 173	51
Act of January 18, 1815, c. 22, Sec. 5, 3 Stat. 180, 182-183	51
Act of January 18, 1815, c. 23, Sec. 9, 3 Stat. 186, 188-189	51
Act of December 23, 1817, c. 1, Sec. 1, 3 Stat. 401	51
Act of August 5, 1861, c. 45, Secs. 35, 36, 12 Stat. 292, 303-304	51
Act of July 1, 1862, c. 119, 12 Stat. 432 *et seq.*:	
Sec. 2-19	51
Secs. 19-22	51
Act of June 30, 1864, c. 173, Secs. 28-31, 13 Stat. 223, 232-236	51
Act of March 3, 1865, c. 78, 13 Stat. 469, 470-471	51
Act of July 13, 1866, c. 184, 14 Stat. 98, 106-109	51
Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.), Sec. 3690	52
Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 6212	2, 1a
Sec. 6213	2, 2a
Sec. 6215	2, 3a
Sec. 6301	2, 3a

Constitution and statutes—Continued	Page
Sec. 6303	2, 3a
Sec. 6321	2, 24, 25, 35, 62, 4a
Sec. 6322	2, 4a
Sec. 6323	3, 5a
Sec. 6323(a)	62, 5a
Sec. 6323(f)	62
Sec. 6331	*passim*, 5a
Sec. 6331(a)	21, 5a
Sec. 6331(b)	21, 52, 6a
Sec. 6332(c)(1)	70
Sec. 6332(c)(2)	70
Sec. 6333	3, 75, 6a
Sec. 6334	65
Sec. 6335	3, 6a
Sec. 6861	3, 7a
Sec. 6861(a)	23, 7a
Sec. 6861(b)	23-24, 7a
Sec. 7342	70
Sec. 7403	3, 8a
Sec. 7403(c)	77
Sec. 7421	39, 69
Sec. 7421(a)	67, 80
Sec. 7426	3, 69, 8a
Sec. 7426(c)	38
Sec. 7602	3, 63, 10a
Sec. 7701(a)(21)	21, 52
Revised Statutes, Section 3187	51
18 U.S.C. 2	3
18 U.S.C. 656	3
An Act for Collecting and Paying Rates or Taxes, Acts and Laws of Connecticut (1784), p. 197:	
pp. 197-204	47
p. 202	45

Constitution and statutes—Continued — Page

An Act to Raise the Supplies for the Year 1782, Secs. LXIII, LXIX, Laws of Maryland (1780-1783), May, 1781, c. IV — 45

Act of 3 October 1730, c. 1, Secs. 12, 13, 2 Acts and Resolves of the Province of Massachusetts, 552-553 — 58

Act of March 16, 1786 (1 Perpetual Laws of Massachusetts (1780-1800):

- Secs. 1, 2 — 44
- Sec. 2 — 44

Act of December 10, 1796, Laws of New Hampshire (December 1796), p. 4 — 45

Act of February 11, 1791, Laws of New Hampshire (1797), pp. 213-214 — 45

Act of March 7, 1788, Sec. II, Laws of New York (1787-1789) (2 Jones & Varick, p. 341 (1789)) — 45

Act for Ascertaining What Property in this State shall be Deemed Taxable Property, The Method of Assessing the Same, and Collecting Public Taxes, Laws of North Carolina (1715-1800), pp. 429, 431 (Iredell, 1791) — 45

Act of March 27, 1782, 2 Pennsylvania Laws (1781-1790), p. 4:

- pp. 5-8, 10-12, Secs. III, IV, VII, VIII, XIX, XXII, XXIII — 47
- p. 12, Sec. XXIV — 46

Act of April 5, 1785, 2 Pennsylvania Laws (1781-1790), p. 306:

- p. 307, Sec. II — 47

Constitution and statutes—Continued — Page

Act of February 27, 1788, 5 Stat., South Carolina (1839 ed.), No. 1383:

- pp. 52-53 — 45
- pp. 50-57 — 47

Act Empowering Collectors to Collect Rates, Vermont State Papers and Laws (1779-1786), pp. 312-313 — 45

Act of October 17, 1797, c. 25, 1797 Vermont Laws Revised, pp. 335-346 — 45, 47

Act for Raising a Supply of Money for Public Exigencies, 9 Hening's Virginia Statutes (1775-1778), p. 358 (October 1777) — 45

Magna Carta, Chapter VIII — 41

7 Geo. III, c. 46, Sec. 10 (Townshend Act) — 55

38 Geo. III, c. 5, Sec. 17 — 42-43

33 Hen. VIII, c. 39 — 42

51 Hen. III, Stat. 4 — 41

Miscellaneous:

Adams, Charles Francis, *The Works of John Adams*, Vol. 2 (1850) — 55, 56, 57

ALI, Restatement of the Law of Torts 2d, § 208 (1965) — 43, 75

1 Annals of Congress 438 (1834 ed.) — 59

Articles of Confederation, Article VIII — 49

II Coke, *Institutes* (1797 ed.) — 41

Federal Rules of Criminal Procedure:

- Rule 41 — 79
- Rule 41(e) — 79

Miscellaneous—Continued

	Page
The Federalist (Cooke ed. 1961):	
No. 15	49
No. 21	49
No. 23	49
No. 30	49
No. 31	50
No. 33	49
No. 83	50
Gilbert, *An Historical View of the Court of Exchequer* (1738)	42
12 Halsbury's *Laws of England* (3d ed. 1955), *Distress*, pp. 196-198, Nos. 363-369	43
H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954)	52
H.R. Rep. No. 1884, 89th Cong., 2d Sess. (1966)	71
Internal Revenue Service Manual § 5341	11a
Manual Supplement 53G-39	14a
Landynski, *Search and Seizure and the Supreme Court* (1966)	44, 48, 56
Lasson, *The History and Development of the Fourth Amendment* (1937)	46, 48, 55, 56, 57
Price, *Treatise on the Law of the Exchequer* (1830)	42
S. Rep. No. 52, 69th Cong., 1st Sess. (1926)	71
S. Rep. No. 1622, 83d Cong., 2d Sess. (1954)	52
Taylor, *Two Studies in Constitutional Interpretation* (1969)	48, 55

Miscellaneous—Continued

	Page
The 13th Yearbook of Edward IV (1461-1483)	43
Treasury Regulations on Procedure and Administration, Section 301.6331-1(a)(1), 26 C.F.R. 301.6331(a)(1)	22
Wroth and Zobel, eds., *Legal Papers of John Adams*, Vol. 2 (1965)	55, 56, 57, 58

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (Pet. App. A-14 to A-21) are not reported. The opinion of the court of appeals (Pet. App. A-1 to A-14) is reported at 514 F.2d 935.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1975 (Appendix C, *infra*, pp. 16a-17a). On

June 17, 1975, the court denied a petition for rehearing by G. M. Leasing Corporation, and also denied its suggestion of rehearing *en banc* (Appendix D, *infra*, pp. 18a-19a). The petition for a writ of certiorari was filed on August 13, 1975, and was granted on December 15, 1975, with respect to Question 2 (A. 14). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The grant of certiorari was limited to a single question (A. 14), which we believe is appropriately rephrased in the following two questions:

1. Whether the seizure by Internal Revenue Service agents of automobiles from various open locations and documents from petitioner's business premises pursuant to their authority under 26 U.S.C. 6331 to collect taxes by "levy" upon all of a taxpayer's property, including "distraint and seizure by any means," violated the Fourth Amendment guarantee against unreasonable searches and seizures.

2. Whether petitioner is entitled to the relief it seeks in this case even if either aspect of the seizure violated the Fourth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, and the Fourth Amendment to the Constitution, and the pertinent provisions of Sections 6212, 6213, 6215, 6301, 6303, 6321, 6322,

6323, 6331, 6333, 6335, 6861, 7403, 7426, and 7602 of the Internal Revenue Code of 1954 (26 U.S.C.), are set forth at Appendix A, *infra*, pp. 1a-10a.

STATEMENT

1. In January 1971, George I. Norman, Jr., was convicted in the United States District Court for the District of Colorado of aiding and abetting a misapplication of funds from a federally-insured bank, in violation of 18 U.S.C. 2 and 656. He was sentenced to two concurrent two-year terms of imprisonment, and his conviction was affirmed on appeal.[1]

In October, 1972, shortly after the court of appeals affirmed the conviction, Internal Revenue Service Agent Philip Clayton of the Salt Lake City, Utah District was assigned to investigate the tax liabilities of Norman for the years 1970 and 1971 (A. 25, 66).

The audit of Norman was initiated because of the following events: In November 1971, Norman and his wife had filed a joint Form 1040 for the year 1970 on which they indicated that their "estimated" tax liability was $280,000, which was paid at that time. However, Norman set forth no other information on that form with respect to his income or deductions by which the Internal Revenue Service could independently compute his tax liability (Deft. Exs. 4, 11; A. 94, 99).

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[1] See *United States* v. *Cooper*, 464 F.2d 648 (C.A. 10), certiorari denied, 409 U.S. 1107.

On April 15, 1972, Norman sought and was granted an extension of time to June 19, 1972, within which to file his 1971 return. At the former time, he submitted to the Internal Revenue Service a check for $405,125 in payment of his estimated 1971 tax liability. That check, however, was dishonored. Although the Internal Revenue Service granted Norman two furth[illegible] extensions of time within which to file his 1971 return, Norman never filed a return for that year (Deft. Ex. 11; A. 103).[2]

Since Norman had filed an almost entirely incomplete Form 1040 for 1970 and no return at all for 1971, Agent Clayton was assigned to investigate his tax liability for those years (A. 25). In conducting his audit, Clayton received no information or cooperation from Norman and therefore had to rely upon third-party sources, including the records of stock brokerage firms (Pet. App. A-2; A. 30, 66-67). In early March 1973, during the audit, and after this Court had denied Norman's petitions for a writ of certiorari (409 U.S. 1107) and for rehearing (410 U.S. 959), Norman failed to surrender to the United States Marshal to begin serving the sentence for his bank fraud conviction. At that time, he became

[2] Although the Certificate of Assessments and Payments for 1971 has an entry which states "Return Filed," the Internal Revenue Service has advised us that Norman in fact filed no return for 1971, as Agent Clayton testified (A. 25, 66). The entry "Return Filed" refers to a document prepared by the Service for the purpose of enabling the computer to record the assessment made against Norman for that year.

a fugitive from justice, and he remains a fugitive to this day (A. 15; Pet. Br. 5).

On March 19, 1973, the Internal Revenue Service determined deficiencies in Norman's tax liability for 1970 and 1971 of $406,099.34 and $545,310.59, respectively.[3] The deficiencies were based solely upon the amount of stock sales that Norman had made through various brokerage houses (A. 30, 67).

Because of the danger to collection of the tax posed by Norman's failure to file returns and by his status as a fugitive from justice, the District Director immediately assessed the deficiencies determined against Norman and his wife, pursuant to his authority under Section 6861 of the Internal Revenue Code of 1954, on the ground that their collection would be jeopardized by delay (Pet. App. A-2; A. 27).

On the following day, March 20, 1973, agents of the Internal Revenue Service visited Norman's personal residence in Salt Lake City to collect the assessed taxes. They informed Mrs. Norman of the jeopardy assessments and requested payment of the tax due. She refused to pay the tax and advised the agents to speak to her attorney, Shirley Jones (A. 56). Pursuant to their authority under Sections 6323 and 6331 of the Code, the agents thereafter filed

[3] The Internal Revenue Service further determined that his wife's tax liability for those two years was $69,265.04 and $84,873.50 (Deft. Exs. 8, 9; A. 95-96). Since the Internal Revenue Service seized the assets held in the name of petitioner G. M. Leasing Corporation on the ground that it was the alter ego of George I. Norman, Jr., the deficiencies against his wife are not at issue in this case.

notices of tax liens with the Salt Lake County Recorder's Office (Deft. Exs. 8, 9; A. 95-96) and levied on one of Norman's bank accounts (A. 58).

While they were at Norman's residence, the revenue agents observed several automobiles parked in the driveway. Their subsequent check with the state motor vehicle department revealed that these automobiles were registered in the name of petitioner G. M. Leasing Corporation and of another corporation owned by Norman. However, there were no automobiles registered in Norman's name or that of his wife (Pet. App. A-2; A. 57, 73).

2. Once the jeopardy assessments were issued and Mrs. Norman refused to pay the tax, the case was assigned to revenue officers who are responsible for collection of delinquent accounts (A. 70-71). On March 21, 1973, the revenue officers met to discuss the assessments against the Normans and the status and activity of petitioner G.M. Leasing Corporation. It was pointed out that petitioner had no license to conduct business within Salt Lake County and that it had no telephone listing (A. 74).

Although petitioner had filed a status report with the Utah Department of Employment Security that indicated that its principal business activity was "Leasing Luxury Automobiles, Boats, etc.," it had no employees during 1972 or the first quarter of 1973 (Deft. Ex. 2; A. 92). On its Utah sales tax return for the second quarter of 1972, petitioner reported no sales (Deft. Ex. 3; A. 93). While a number of valuable luxury and antique automobiles were

registered in petitioner's name, none of them was of the type that would normally be used in a leasing business. Some of these automobiles were parked at Norman's residence, which suggested that his family used them for personal purposes (A. 74).

These facts indicated to the revenue officers that petitioner was not engaged in any business activity but was an alter ego of Norman and served as a repository of at least some of his personal assets. The revenue officers thereupon consulted with the Regional Counsel of the Internal Revenue Service and described to him the facts they had discovered with respect to petitioner's status. With the concurrence of the Regional Counsel, the revenue officers concluded that the assets of petitioner actually belonged to Norman and determined to take such enforcement action as appeared necessary to protect the government's interests. They decided to levy upon and seize the automobiles titled in petitioner's name in partial satisfaction of the tax assessments against Norman (A. 75-76).

On or about March 21, 1973, the revenue officers seized several automobiles, including a 1972 Stutz, a Rolls Royce Phantom V, a 1930 Rolls Royce Phantom, two 1971 Stutzes, and a Jaguar. The first three were seized from two different locations in Salt Lake City, the next two were seized from a parking lot in Los Angeles, California, and the last automobile was seized from the vicinity of Norman's personal residence (A. 58, 121). These cars were registered in the name of petitioner (A. 75-76). The revenue

officers left a Chevrolet and a station wagon for the personal use of Mrs. Norman and her family (A. 58).[4]

On March 21, 1973, two Internal Revenue collection officers went to petitioner's office at 4751-4753 Holladay Boulevard in Salt Lake County for the purpose of levying on property subject to seizure, including the building itself (Pet. App. A-3; A. 19). The agents had learned that one or two additional valuable automobiles were located at these premises, which consisted of a cottage-type building and garage to which Real Estate, Incorporated, another corporation of Norman's, held title (A. 77). After they arrived, the officers determined that there was a car in the garage and telephoned their superior, Bert Applegate, requesting him to come out and give them some assistance (A. 19-20, 77-79).

Applegate took two other revenue officers with him and went to the premises. Upon Applegate's arrival, he observed that there was a locksmith on the scene and learned that he had just removed

[4] As of March 1973, there were seven automobiles registered in petitioner's name: a two-door blue Stutz, a two-door tan Stutz, a four-door burgundy Stutz, a two-door burgundy Stutz, a 1965 Rolls Royce limousine, a 1929 Rolls Royce Phantom I, and a 1972 Jaguar sedan. The two-door tan Stutz (valued at $30,000) and the four-door burgundy Stutz (valued at $100,000) were financed with loans from Murray First Thrift, a finance company. Following the tax levy, the finance company foreclosed its liens and arranged with Norman's attorney and one of his associates for the sale of the two automobiles (A. 33, 110, 122). The government did not participate in these transactions and did not receive any portion of the sales proceeds.

the lock from the garage door at the direction of the revenue officers. Inside the garage was a Stutz automobile. Applegate also observed that the locksmith had removed the lock on the back door of the cottage (A. 19-20, 77-79).

The outward appearance of the Holladay Boulevard cottage was such that it could have been a personal residence. After Applegate entered the cottage, he observed that there was a room with a stove and a refrigerator, which suggested that the cottage might have been used as a personal residence. Although the revenue officers stated that they were sure the cottage was not a personal residence, Applegate instructed them not to proceed with the seizure of any property until the status of the cottage could be confirmed (A. 23-24, 80-81).

Applegate took this precautionary action because the Internal Revenue Service does not, as a matter of policy, seize personal residences by means of forced entry without the consent of the occupant (see Appendix B, *infra*, pp. 11a-12a). Thus, after remaining in the cottage for three or four minutes, the collection officers left without taking anything (A. 23-24, 80-81). When Applegate instructed the collection officers that no seizures were to be made, they restored the locks on the doors to their original condition (A. 82).

While the collection officers were in the cottage, Norman's son, George I. Norman, III, arrived there. After learning that the revenue officers had decided to seize the Stutz automobile, he told them that it

did not belong to his father but to petitioner. At this point, the officers decided not to seize the automobile. Applegate asked Norman's son to provide him with some information concerning the ownership of the Stutz so that they could determine whether to seize it (A. 79-80).

In the interim, the Service's investigation turned up additional evidence in support of the original determination that the cottage was a place of business and not a personal residence (A. 62-63). Specifically, a Mr. Redd, who served as a contractor for Norman, told Agent Applegate that the cottage was the place where Norman carried on much of his business (A. 79).

During the evening and throughout the night following their March 21 visit to petitioner's premises, Internal Revenue agents observed that the lights were on in the cottage and there was a good deal of activity there. Various persons were seen removing boxes of unknown material from the cottage. Moreover, the next morning, the agents observed that the Stutz automobile had disappeared from the garage (A. 83).

Because these events indicated that unknown persons were putting property believed to belong to Norman beyond the reach of the Internal Revenue Service, the collection officers decided to seize the cottage, its furnishings and any other remaining assets that could be found there (A. 83). On March 23, 1973, the revenue officers returned to petitioner's cottage-office for the purpose of seizing it and its

contents.[5] Prior to this seizure, all of the Internal Revenue Service agents who had any connection with the investigation of Norman's tax liability and the collection of the outstanding assessments discussed the case at great length. At that time, the agents again discussed the propriety of a second seizure with the Regional Counsel of the Internal Revenue Service (A. 82-84).

The seizure was carried out with the assistance of locksmiths and personnel and equipment of a private van and storage firm. The revenue agents packed and removed all of the remaining contents of the cottage, including furnishings and books and records. In accordance with their statutory duty under Section 6335 of the Code, the agents made an inventory of the property seized from the cottage (A. 84).

The revenue agents hoped to be able to examine the books and records in order to see if they contained any assets such as stock certificates and to seek information concerning the location of other assets. However, the Regional Counsel instructed the agents not to examine the books and records but to pack them in sealed boxes and remove them to a safe storage place (A. 84-85). This procedure was followed because the cottage had been broken into once before

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[5] The cottage itself was seized as part of a levy on Real Estate, Inc., another corporation which the Service determined to be an alter ego of Norman (Deft. Ex. 10; A. 97). That corporation is not a party to this suit, and the relief petitioner requests does not include the return of the cottage building (see A. 123-124). Moreover, petitioner has not requested return of the furnishings that were seized from its business premises.

and it was deemed unwise to leave anything of value in an unattended building (Pet. App. A-3; A. 88-89).

During the seizure of the cottage and its contents, Shirley Jones, a lawyer who had performed services for Norman,[6] arrived on the scene. He telephoned the Office of the Regional Counsel of the Service and was told by Richard Brennan of that office that the books and records were being seized because they might contain cash or stock certificates. Brennan invited Jones to come to the Internal Revenue Service and examine the files with the agents. However, Jones declined to do so because he had no authority to act as attorney for petitioner and had told Norman by telephone that he would not represent him unless he surrendered himself (A. 47).

3. On May 3, 1973, petitioner instituted this suit in the United States District Court for the District of Utah. Its amended complaint, filed on June 5, 1973, asserted three causes of action: (1) a claim for wrongful levy under Section 7426 of the Internal Revenue Code, seeking return of the seized automobiles; (2) a claim for suppression of evidence obtained from the seized documents under Rule 41 of the Federal Rules of Criminal Procedure; and (3) a claim against the individual revenue agents for damages (A. 105-111).

Shortly after the commencement of this action, the Internal Revenue Service returned to the Norman

[6] Jones had represented Norman in the criminal bank fraud case (see 464 F.2d at 649) and in the formation of petitioner (A. 43).

residence the originals of the documents seized from petitioner's cottage-office (A. 122). Prior to returning them, however, Agent Clayton unsealed the boxes in which the records were stored and photocopied them at the request of the Regional Counsel (Pet. App. A-3; A. 29-30). The only items of the documents seized that pertained to petitioner were a few papers relating to the ownership of the automobiles and one bank statement containing a few checks (A. 30-31).

In a second amended complaint, petitioner alleged, *inter alia*, that the tax assessments and the issuance of jeopardy tax assessments against Norman were arbitrary and capricious, that it was not an alter ego of Norman, and that the levy upon its premises and the contents thereof violated the Fourth Amendment (Pet. App. A-3 to A-4; A. 119-121).[7] The complaint requested, as relief, the return or destruction of the photocopies of the seized documents; return of the automobiles levied upon and seized and an order forever barring the government from seizing them; suppression of evidence obtained from the seized documents and an order forever barring the government

[7] Norman's son, George I. Norman, III, filed a complaint in intervention alleging the same facts and requesting essentially the same relief (A. 112-116). The district court permitted him to intervene (A. 9).

from obtaining such evidence by any means; release of all levies; a declaration that petitioner was not an alter ego of George I. Norman, Jr.; and general and punitive damages of $525,000 against the individual revenue agents as compensation for the invasion of its constitutional rights (A. 123-124). In response, the government filed a counterclaim, seeking an order that the federal tax liens attaching to Norman's property be foreclosed against the property held in the name of petitioner (A. 127-134).

A trial was held before Judge Willis W. Ritter. At the trial, the revenue agents, George I. Norman, III, and various other persons connected with Norman testified. The evidence established that Norman originally held title to some of the automobiles registered in the name of petitioner (A. 37), that petitioner had no employees and did not lease any cars (A. 39), that petitioner was organized in April 1972 but the cars were not transferred to it until the end of 1972, and that petitioner never issued any stock, held any directors' meetings, or engaged in any business (Pet. App. A-6 to A-8; A. 43-45).

The district court entered judgment for petitioner and intervenor George I. Norman, III. It held: (1) that named employees of the Internal Revenue Service committed an illegal search and seizure of petitioner's offices, which it found also to be intervenor's residence, in violation of the Fourth Amendment and that the photocopies of the seized books and records in the possession of the Internal Revenue Service

should be destroyed because any use of them would be illegal; (2) that petitioner and intervenor were entitled to general and punitive damages in an indeterminate amount; (3) that the government's counterclaim should be dismissed with prejudice; and (4) that the Internal Revenue Service should return all of the seized automobiles of petitioner and assets of the intervenor[8] and pay petitioner for the value of the two automobiles it had allegedly sold (Pet. App. A-20 to A-21).

4. The court of appeals unanimously reversed (Pet. App. A-1 to A-14). It held that the evidence established beyond question that petitioner was the alter ego of Norman and that the district court's contrary finding was clearly erroneous (Pet. App. A-5 to A-8). It further held (Pet. App. A-8 to A-9) that the trial court erred in failing to make independent findings of fact or conclusions of law but simply accepting those prepared by petitioner. As the court of appeals stated, "[t]his practice of the same trial judge has been twice condemned. See *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, * * *; *Kelson* v. *United States*, [503 F.2d 1291 (C.A. 10)]" (Pet. App. A-9).

The court of appeals also ruled that the district court erred in holding that petitioner's documents and automobiles were illegally seized and in ordering the return of the automobiles and the suppression of

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[8] The Service also had levied on and seized 7,143 shares of stock of Emdeko International, Inc. held by George I. Norman, III. See nn. 10, 13, *infra*.

the documents. After observing that there was no evidence in the record to support the trial court's finding (No. 10, Pet. App. A-16) that the behavior of one of the revenue agents was malicious, the court concluded that the Internal Revenue Service conducted a statutorily valid tax levy authorized by 26 U.S.C. 6331. In the court of appeals' view, the revenue agents were acting pursuant to statute and did not make an illegal search (Pet. App. A-9 to A-10).

The court of appeals also reversed the trial court's judgment insofar as it had awarded petitioner and intervenor money damages against the revenue agents, and had ordered return of the assets levied upon and removal of all levies and liens. The court also held that use of photocopies of the seized books and records would not be illegal[9] (Pet. App. A-13 to A-14).

Finally, the court of appeals concluded that petitioner had not met its burden of proving that the assessments against Norman were erroneous. Accordingly, it held that the trial court erred in invalidating the assessments and in dismissing the government's counterclaim[10] (Pet. App. A-10 to A-12).

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[9] This aspect of the court's holding appears to be moot. We are advised by the Internal Revenue Service that while the case was pending on appeal it voluntarily destroyed all existing photocopies of the seized books and records that were in its possession. To the best of the Service's knowledge, there are no other remaining photocopies.

[10] In accordance with the government's concession, the court of appeals affirmed the trial court only with respect to its order for the return of 7,000 shares of Emdeko stock to intervenor George I. Norman, III. However, the court of appeals held that the remaining 143 shares were properly levied upon as Norman's assets (Pet. App. A-13).

SUMMARY OF ARGUMENT

1. This case involves the constitutional validity under the Fourth Amendment of warrantless seizures of property by the Internal Revenue Service pursuant to its longstanding statutory authority (26 U.S.C. 6331) to levy upon the assets of a delinquent taxpayer to satisfy unpaid tax assessments. The property in question consisted of automobiles seized from open locations and documents seized from petitioner's business premises after a forcible entry.

Two decisions of this Court—*Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, and *Boyd* v. *United States*, 116 U.S. 616—support the constitutionality of the warrantless seizure of a delinquent taxpayer's property. Thus, under well-settled principles, the agents' warrantless seizure of automobiles from non-private locations did not violate the Fourth Amendment.

In *Murray's Lessee*, the Court ruled that a distress warrant issued by the Treasury which empowered the government to seize a debtor's land without a judicial warrant did not violate the Fourth Amendment. *Boyd* v. *United States*, *supra*, reaffirmed this principle. There, the Court stated that a non-investigatory summary seizure of goods forfeited for a breach of the revenue laws was not "unreasonable"

within the meaning of the Fourth Amendment, observing that such seizures were authorized by English statutes for at least two centuries and by the revenue acts from the beginnings of the Republic. The privacy interests at stake in such a tax seizure are sufficiently small so as not to require antecedent judicial approval. This proposition is confirmed by the numerous decisions of this Court in other areas of the law upholding warrantless forfeitures as well as warrantless investigatory searches and seizures of automobiles.

2. It may not be necessary for the Court to reach the question of the seizure of the documents because petitioner would not be entitled to the relief it seeks with respect to the documents however the Fourth Amendment issue is decided. Its claims for return of the documents, destruction of photocopies, and suppression, are either moot or premature. Moreover, its claims for damages are unsupported by any proof of injury and are refuted by the good faith conduct of the agents.

At all events, the warrantless seizure of the documents from petitioner's business premises did not violate the Fourth Amendment. The common law practice and early statutes antedating the Fourth Amendment, as well as the history of the adoption of that constitutional provision, confirm the correctness of the court of appeals' conclusion that the Fourth Amendment was not intended to prohibit the type of warrantless seizure of property from the business premises of a delinquent taxpayer that occurred in this case. A series of English statutes which

date back to the thirteenth century established the right of the sovereign to seize the property of its debtors. It was likewise well established that officers could forcibly enter nonresidential buildings to collect debts due to the Crown.

Warrantless seizures of a taxpayer's property to collect taxes also were authorized by various revenue statutes enacted in America prior to the ratification of the Constitution. Significantly, these statutes existed in each of the original States that had adopted a prohibition against unreasonable searches and seizures in its declaration of rights—prohibitions that were the historical antecedents of the Fourth Amendment. Thus, these early statutes reflect the understanding that the common law procedures permitting seizure of property to collect taxes without a judicial warrant did not violate the constitutional prohibition against unreasonable searches and seizures that was soon to be formally adopted as the Fourth Amendment.

The Framers of the Constitution likewise saw no inconsistency between the guarantee of the Fourth Amendment and the statutory authority of the Treasury to collect taxes by summary means. From the very beginnings of the Republic, the statutory power of seizure now set forth in Section 6331 of the current Code was regarded as a necessary and proper exercise of the Congressional taxing power. Thus, the First Congress, which also proposed adoption of the Bill of Rights, and every subsequent Congress provided that taxes could be levied by distraint and

seizure. The views of the early Congresses constitute particularly persuasive authority regarding the types of searches and seizures that were barred by the Fourth Amendment.

3. Assuming that the absence of a judicial warrant did not violate the Fourth Amendment, the conduct of the revenue agents in executing the levy and seizure complied with the procedures contemplated by Section 6331 and was therefore reasonable. With respect to the automobiles that were seized from various open places without any forcible entry, the reasonableness of the agents' actions is well established.

The agents' conduct with respect to the seizure of the contents of petitioner's business premises likewise met the requirements of the Fourth Amendment. In enacting the levy and seizure statute, Congress provided a mechanism by which the Treasury could enforce collection against recalcitrant taxpayers. Congress did not intend this procedure to be frustrated if the taxpayer placed all of his property behind locked doors. Thus, Congress must have intended that a reasonable degree of force could be constitutionally employed to gain access to a delinquent taxpayer's private business premises where necessary to accomplish a seizure of his property to collect taxes he owes.

ARGUMENT

I. The Warrantless Seizure By The Secretary Of The Treasury Of Property Of A Delinquent Taxpayer, Pursuant To Levy Under Section 6331(a) Of The Internal Revenue Code, Does Not Violate The Fourth Amendment

A. *Introduction*

1. This case involves the constitutional validity of seizures of property by the Internal Revenue Service pursuant to its longstanding statutory power to levy upon the assets of a delinquent taxpayer to satisfy unpaid tax assessments. Section 6331(a) of the Internal Revenue Code of 1954 (Appendix A, *infra*) authorizes the Secretary of the Treasury or his delegate, the Commissioner of Internal Revenue, to collect taxes "by levy upon all property and rights to property" belonging to a person who neglects or refuses to pay any tax or "on which there is a lien * * * for the payment of such tax." Section 6331(b) defines the term "levy" as including "the power of distraint and seizure by any means." See also Section 7701(a)(21) of the Code.

Both tangible and intangible property are subject to levy. Section 6331(b) of the Code makes this explicit by providing that the government may, in the exercise of its levy power, "seize and sell * * * property or rights to property (whether real or personal, tangible or intangible)." Levy upon tangible property normally is effected by service of a Levy (Form 668-B) or Notice of Levy (Form 668-A) and phys-

ical seizure of the property.[11] Where physical seizure is not feasible or necessary, the property is posted or tagged in a manner that indicates that it has been taken into the government's custody. Since intangible property is not susceptible to physical seizure, posting, or tagging, levy upon intangible property is effected by serving the appropriate form upon the person holding the property or rights to property: "[l]evy may be made by serving a notice of levy on any person in possession of, or obligated with respect to, property or rights to property subject to levy including receivables, bank accounts, evidences of debt, securities, and accrued salaries, wages, commissions, and other compensation." Section 301.6331-1(a)(1) of the Treasury Regulations on Procedure and Administration, 26 C.F.R. 301.6331-1(a)(1). See *Phelps* v. *United States*, 421 U.S. 330, 335-337. Thus, the statute permits the summary collection of taxes from persons who by their actions have demonstrated their refusal to meet their tax obligations on a voluntary basis.

The Court has recognized that the Internal Revenue Service sometimes is required to exert compulsion in enforcing the revenue laws. As the Court observed in *United States* v. *Bisceglia*, 420 U.S. 141, 145, "our tax structure is based on a system of self-reporting. There is legal compulsion, to be sure, but

[11] The Levy is served upon the taxpayer; the Notice of Levy is served upon third persons. When service is made upon a third person, a copy of the Notice of Levy is furnished to the taxpayer.

basically the Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability. Nonetheless, it would be naive to ignore the reality that some persons attempt to outwit the system * * *."

While *Bisceglia* involved the Internal Revenue Service's power to exercise compulsion to ascertain the identity of a potential tax evader, the Court's observation is equally appropriate here, where the taxpayer's "attempt to outwit the system" consisted of failing to file returns, refusing to cooperate with an audit, and seeking to defeat collection by concealing some of his assets in a sham corporation such as petitioner. After the audit of Norman resulted in substantial deficiencies based upon his stock brokerage account records, Norman became and still is a fugitive from justice arising out of his federal conviction for misapplication of bank funds. Because of the danger to collection posed by Norman's fugitive status, the District Director authorized the issuance of jeopardy assessments under Section 6861(a) of the Code.[12]

[12] By allowing an immediate assessment, Section 6861(a) provides an exception to the general rule barring an assessment until the taxpayer has received a notice of deficiency and has been given an opportunity to file a petition in the Tax Court. Within 60 days after the jeopardy assessment, Section

The Service exercises its levy power when a taxpayer's liability remains unpaid after assessment and demand for payment. But its ability to seize the property of delinquent or recalcitrant taxpayers such as Norman is vital to the successful functioning of the tax system. Apart from the fact that the effective exercise of the levy power insures that all persons, regardless of the degree of their cooperation with the Service, will satisfy their tax liability, the very existence of the levy power encourages the voluntary compliance upon which our self-assessment tax system depends. If the public believed that non-cooperation with the Internal Revenue Service would result in a lesser degree of collection of tax liabilities, the Service could no longer effectively collect the taxes, which are "the life-blood of government, and their prompt and certain availability an imperious need." *Bull* v. *United States*, 295 U.S. 247, 259.

2. Under Section 6321 of the Code, the outstanding assessments were a lien in favor of the United States upon all property belonging to Norman. The Service subsequently determined that the petitioner corporation was the repository of the personal assets

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6861(b) requires the District Director to send the taxpayer a notice of deficiency, which enables the taxpayer to file a petition with the Tax Court for a redetermination of the deficiency. See *Laing* v. *United States*, No. 73-1808, decided January 13, 1976, slip op. 8-9. We are advised by the Internal Revenue Service that it sent Norman a notice of deficiency within the prescribed period, and that Norman thereupon filed a petition in the Tax Court, where his case is awaiting trial (No. 6000-73).

of Norman and was his alter ego. If a corporate entity is engaged in no business activity but is only employed as an agent of its shareholder, it is well established that "the maintenance of effective benefit through the interposition of a subservient agency" (*Griffiths* v. *Commissioner*, 308 U.S. 355, 358) will not be given effect for federal tax purposes. Accord: *Higgins* v. *Smith*, 308 U.S. 473, 476. Thus, from the standpoint of the tax statute, petitioner G.M. Leasing Corporation had no independent existence apart from the taxpayer Norman. The Service therefore properly treated petitioner's assets as property of Norman that was subject to lien under Section 6321 of the Code. Since Section 6331 authorizes a levy and seizure of all property of such a person "on which there is a lien * * * for the payment of [delinquent] tax[es]," the Service was empowered to levy upon assets held in petitioner's name in satisfaction of Norman's tax liability. See *United States* v. *Plastic Electro-Finishing Corp.*, 313 F. Supp. 330, 333-334 (E.D.N.Y.), affirmed *per curiam*, No. 35,227, decided March 23, 1971 (C.A. 2).

After observing that various persons had begun to remove boxes of material from petitioner's business premises so that Norman's property located on petitioner's premises was fast disappearing, the Service exercised its Section 6331 power and seized several of Norman's automobiles, to which petitioner had

title, from various open locations and documents from petitioner's premises.[13]

3. The grant of certiorari is limited to the question whether these tax levies and seizures violated the Fourth Amendment guarantee against unreasonable searches and seizures (A. 14).[14] The issue here is not

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[13] Petitioners are G. M. Leasing Corporation and George I. Norman, III, whom the district court permitted to intervene (A. 9). Unless otherwise indicated, references to "petitioner" are to G. M. Leasing Corporation.

[14] The court of appeals upheld the correctness of both the tax assessments against Norman and the Service's determination that petitioner was a repository of the personal assets and alter ego of Norman (Pet. App. A-5 to A-8, A-11 to A-13), and this Court denied certiorari insofar as the petition sought review of those questions. Hence, petitioner's arguments (Br. 10-11, 29, 30, 32, 36) with respect to these issues are beyond the scope of the grant of certiorari.

Moreover, the claims of petitioner George I. Norman, III, are outside the grant of certiorari. The sole basis of Norman III's complaint in intervention (A. 112-116) was the assertion of an illegal seizure of certain stock belonging to him. But as his complaint alleges, the stock was seized from the stock transfer agent (A. 114) and that collection action had no connection with the seizure of the automobiles from various open locations and the documents from G. M. Leasing's premises which are the subject of the Fourth Amendment claim before the Court. At all events, the government has returned to Norman, III 7,000 of the 7,143 shares of stock seized from him, and the Internal Revenue Service properly levied on the remaining 143 shares (Pet. App. A-13). Norman, III did not appeal with respect to the 143 shares and the government did not appeal with respect to the 7,000 shares. The claims of Norman, III are accordingly no longer at issue.

whether the Fourth Amendment regulates the conduct of revenue agents in their execution of a levy, but the question is whether the Service can levy upon and seize a delinquent taxpayer's property without obtaining a judicial warrant. We submit that the pertinent historical materials demonstrate that the warrant requirement does not apply to such tax seizures. Thus, the Internal Revenue Service's warrantless levy and seizure in this case did not violate the Fourth Amendment.

First, under well-settled principles, the agents' warrantless seizure of various automobiles from what appear to have been public or quasi-public places (such as parking lots and streets) did not violate the Fourth Amendment. If the Service has an outstanding tax assessment against a person, and one of its agents discovers property such as an automobile or any other chattel belonging to that person in an open place, the decisions of this Court have long held that the agent does not need a warrant to seize that property. The privacy interests at stake in such a seizure are sufficiently small as not to require antecedent judicial approval.

It may not be necessary on the facts of this case for the Court to reach the question of the Service's seizure of documents from petitioner's business premises. As we discuss in greater detail in Point II, *infra*, pp. 76-81, petitioner is not entitled to its claimed relief with respect to the documents however the Court decides the Fourth Amendment issues. Since

the Service returned the originals at the commencement of this litigation and thereafter destroyed the photocopies, the first aspect of petitioner's requested relief is moot. Moreover, petitioner's request for a suppression order with respect to evidence obtained from the seized documents is premature because there are no proceedings, either pending or contemplated, in which such evidence would be used by the government. Finally, to the extent that petitioner's claim for damages against the revenue agents is directed against their temporary seizure of its books and related documents, the record contains no proof of injury and establishes the good faith of the agents in conducting the levy. The Court may therefore conclude that it is inappropriate to address petitioner's Fourth Amendment claim with respect to the seizure of the documents.

At all events, it is our submission that the warrantless seizure of the documents from petitioner's business premises did not violate the Fourth Amendment. The privacy values of the Fourth Amendment usually implicate the warrant requirement when there is a governmental intrusion into private premises. But we submit that the warrantless entry by Internal Revenue agents into a delinquent taxpayer's premises for the purpose of searching for and seizing his property reasonably believed to be present therein to satisfy a specific tax debt (especially under circumstances where, as here, the taxpayer's property is about to disappear) is an historical exception to the Fourth Amendment warrant re-

quirement analogous to the warrantless seizure of forfeitable property. As we shall show, the sovereign's right to enter private premises for that purpose was well established both at common law and at the time of the ratification of the Bill of Rights. Thus, the Fourth Amendment did not impose a warrant requirement on this narrow category of seizures but only required that they be "reasonable."

Agents of the Internal Revenue Service are subject to strict guidelines concerning their conduct of levies and seizures. They must ascertain that property about to be seized in fact belongs to the taxpayer. Moreover, they are not permitted to enter personal residences over the objection of the occupant, nor are they permitted to use physical force against any person (see Appendix B, *infra*, pp. 11a-15a). Finally, we are advised that the Internal Revenue Service does not levy upon and seize a taxpayer's books and records for the investigatory purpose of obtaining evidence of civil tax liability or a criminal tax violation. These self-imposed limitations are reflected in the facts of this case, where the agents acted only after receipt of reliable information that petitioner G.M. Leasing Corporation was the alter ego of the delinquent taxpayer, that the cottage was G.M. Leasing's business premises and not a personal residence, and observed that various persons were removing prop-

erty from petitioner's business premises.[15] Under these circumstances, their prompt seizure of the premises and its contents was the only reasonable means of protecting the government's interest in the taxpayer's property.

B. *This Court Has Upheld the Validity Under the Fourth Amendment of Warrantless Seizures of the Property of Delinquent Taxpayers*

1. Two decisions of this Court—*Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, and *Boyd* v. *United States*, 116 U.S. 616—support the constitutionality of warrantless seizures of the property of delinquent taxpayers such as the automobiles in this case.

a. In *Murray's Lessee*, the Court unanimously held more than a century ago that a "distress warrant" issued by the Treasury, authorizing the seizure of a debtor's land in satisfaction of a claim of the United States, did not violate the Fourth Amendment. The question arose in the context of an action for ejectment brought by a judgment creditor

[15] Although petitioner describes (Br. 11) the premises in question as the personal residence of George I. Norman, III, the record confirms the agents' determination that the building was not a personal residence but was petitioner's business premises (A. 62-63, 79). Contrary to petitioner's characterization of the premises (Br. 11), the fact that Norman, III kept some of his personal property in the building (A. 34-35) did not transform it into his personal residence.

of the debtor against the party who purchased the land at a sale conducted by the United States Marshal. In arguing in support of its title, the plaintiff contended that the distress warrant issued by the Treasury was unconstitutional because it could only be issued by the judiciary, and that the warrant violated the Fourth Amendment because it was not supported by oath or affirmation.

The Court rejected both of the arguments, and ruled (1) that the exercise of executive powers to collect a debt due the government by summary process without resort to the judiciary was not unconstitutional, and (2) that the distress warrant which empowered the government to seize the debtor's land did not violate the judicial warrant requirements of the Fourth Amendment. The Court stated, in terms strikingly appropriate to petitioner's claim (18 How. at 285-286)—

> The remaining objection to this warrant is, that it was issued without the support of an oath or affirmation, and so was forbidden by the fourth article of the amendments of the constitution. *But this article has no reference to civil proceedings for the recovery of debts, of which a search warrant is not made part.* The process, in this case, is termed, in the act of congress, a warrant of distress. The name bestowed upon it cannot affect its constitutional validity. In substance, it is an extent authorizing a levy for the satisfaction of a debt; and as no other authority is conferred, to make searches or seizures, than is ordinarily embraced in every execution issued upon a recognizance,

> or a stipulation in the admiralty, we are of opinion it was not invalid for this cause [emphasis supplied].

The distress warrant and the seizure upheld in *Murray's Lessee* is the precise analogue of the Treasury's current statutory power of "distraint and seizure by any means" which was exercised in this case. The inapplicability of the Fourth Amendment warrant requirements to the Treasury distress warrants of an earlier day and the present Internal Revenue Service levy and seizure rests upon the fact that such warrants, like a sheriff's writ of execution of a judgment on behalf of a private creditor, are issued only to obtain property of the debtor and not to obtain information about him. Thus, while the execution of a tax levy may involve a search and necessarily requires a seizure, such actions in aid of tax collection are analogous to the common law execution by a judgment creditor. *Yazoo & M.V.R.R. Co.* v. *Clarksdale*, 257 U.S. 10, 19. They are not equivalent to the execution of an investigative search warrant which may be issued only by a judicial officer upon probable cause. See, *e.g.*, *Johnson* v. *United States*, 333 U.S. 10, 13-14; *Coolidge* v. *New Hampshire*, 403 U.S. 443, 449-453.

b. *Boyd* v. *United States*, 116 U.S. 616, reaffirmed this principle. Although holding that a person could not be compelled by subpoena to produce documents that might incriminate him, the Court stated that a summary seizure of goods forfeited for a breach of the revenue laws or concealed to avoid the duties payable on them was not "unreasonable" within the

meaning of the Fourth Amendment. As the Court observed, such seizures "[have] been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government" (116 U.S. at 623). See *United States* v. *Biswell*, 406 U.S. 311, 314, n.3. Indeed, the Court distinguished investigatory searches from tax seizures (116 U.S. at 623), which it compared to "[t]he entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution * * *" (*id.* at 624).[16] See, *e.g.*, *Erskine* v. *Hohnbach*, 14 Wall. 613, 617; *Haffin* v. *Mason*, 15 Wall. 671, 675; *United States* v. *Hess*, 26 Fed. Cas. 295 (No. 15,358) (C.C. D. Ore.). See also *Phelps* v. *United States*, *supra*, 421 U.S. at 337.

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[16] *Entick* v. *Carrington*, 19 Howell's State Trials 1029, cited in *Boyd* (116 U.S. at 626-627) and upon which petitioner relies (Br. 14, 19, 32), similarly recognized an exception for the seizure of property for purposes of tax collection. There, Lord Camden stated (*id.* at 1066):

> The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. *The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes, etc. are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good.* [Emphasis supplied.]

2. At least with respect to the seizure of the automobiles, or indeed of any other type of personal property, these two decisions answer petitioner's contentions that the Internal Revenue Service's seizure of the taxpayer's property violated the Fourth Amendment because it was made without a judicial warrant.[17] The Court's decisions in other areas of the law involving investigatory searches of automobiles seized from non-private locations confirm the correctness of this proposition. Although vehicles are "effects" within the meaning of the Fourth Amendment, there is "a constitutional difference between houses and cars" for purposes of the warrant requirement. *Chambers* v. *Maroney*, 399 U.S. 42, 52; *Carroll* v. *United States*, 267 U.S. 132, 153-154; *Cooper* v. *California*, 386 U.S. 58, 59; *Cady* v. *Dombrowski*, *supra*, 413 U.S. at 441. Most recently, in *Cardwell* v. *Lewis*, 417 U.S. 583, a plurality of the Court concluded that

[17] In apparent recognition of the applicability of *Murray's Lessee* to this case, petitioner argues (Br. 18-19) that "it is questionable whether that conclusion was warranted" in light of the history of the Fourth Amendment and in light of *Boyd*. But *Boyd* reinforces the holding in *Murray's Lessee*. Moreover, the Court has consistently cited *Murray's Lessee* with approval. See *Davidson* v. *New Orleans*, 96 U.S. 97, 102, 107; *Springer* v. *United States*, 102 U.S. 586, 594; *Palmer* v. *McMahon*, 133 U.S. 660, 669; *French* v. *Barber Asphalt Paving Co.*, 181 U.S. 324, 329; *Leigh* v. *Green*, 193 U.S. 79, 88; *Scottish Union and National Insurance Company* v. *Bowland*, 196 U.S. 611, 632; *New Hampshire Fire Insurance Co.* v. *Scanlon*, 362 U.S. 404, 408. Finally, as we discuss *infra*, pp. 40-60, the history of the adoption of the Fourth Amendment supports this Court's conclusion that its warrant requirement was not intended to govern tax seizures.

a warrantless examination of the exterior of an automobile seized by the police from a public parking lot on probable cause was reasonable and did not infringe upon the owner's right of privacy that is the core interest protected by the Fourth Amendment.

The constitutional validity of the warrantless seizure of the automobiles in this case follows *a fortiori* from these decisions. Here, the revenue agents' seizure was not accompanied by any investigatory "search" of either the interior or the exterior of the automobiles. While the seizure served to deprive petitioner (and thus the taxpayer) of its proprietary interest in the automobiles, the agents' action did not violate any privacy interest. Since there is no abridgement of any expectation of privacy at stake but only the validity of the transfer of a proprietary interest (which can be rectified by the return of the property or by some form of monetary compensation), there is even less necessity for the interposition of a judicial officer to make the probable cause finding. The values of the Fourth Amendment are sufficiently protected in such cases by its general reasonableness requirement without the need for antecedent magisterial approval to deprive a delinquent taxpayer of his possessory interest in a chattel.

The proprietary interest of the government in the taxpayer's assets held in the name of petitioner is significant. As we have pointed out at pp. 24-25, *supra*, Section 6321 of the Code imposes a lien on all property belonging to the delinquent taxpayer. Thus, in a very real sense, the agents' seizure of the automobiles and of the building in which petitioner main-

tained its business premises served to assert and safeguard the government's interest in both the automobiles and the contents of petitioner's business premises. In an analogous context, the Court in *Davis* v. *United States*, 328 U.S. 582, upheld the warrantless search and seizure of gasoline ration coupons and their evidentiary use in a criminal proceeding on the theory that they never became the private property of the holder but remained at all times the property of the government. In so holding, the Court observed that "an owner of property who seeks to take it from one who is unlawfully in possession has long been recognized to have greater leeway than he would have but for his right to possession. The claim of ownership will even justify a trespass and warrant steps otherwise unlawful. [citations omitted]" (328 U.S. at 591).

In light of the above, it is hardly surprising that no court has held that the Fourth Amendment judicial warrant requirements are applicable to the Treasury in the exercise of its statutory power to levy upon and seize a delinquent taxpayer's properties such as the automobiles in this case. Because such seizures are undertaken for the non-investigatory purpose of collecting debts owed to the government, they come within a narrow category of governmental actions, which, like forfeitures,[15] do not implicate the warrant requirement of the Fourth Amendment.

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[15] See *Boyd* v. *United States, supra*, 116 U.S. at 623; *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663. Significantly, in upholding the constitutionality of a Puerto Rican forfeiture statute in *Calero-Toledo*, the Court did not discuss the Fourth Amendment.

Indeed, the only federal appellate decision that holds that the warrant requirement of the Fourth Amendment does apply to the seizure of an automobile from the defendant's driveway containing forfeitable contraband is *United States* v. *McCormick*, 502 F.2d 281 (C.A. 9). There, the court grounded its decision in large part on the fact that the agents had ample opportunity to obtain a warrant and that there were no exigent circumstances indicating that the automobile was about to be moved. The court also noted that the automobile was not contraband *per se*, and that there was an ensuing warrantless investigatory search of the contents of the automobile.

While the investigatory search aspects of *McCormick* distinguish it from the seizures in this case, we believe that *McCormick* was wrongly decided insofar as it held that a warrant was necessary for a seizure of forfeitable property. In this respect, it is significant that all the other circuit courts of appeals which have considered the matter have held that no warrant is required to seize a vehicle for forfeiture. *United States* v. *Troiano*, 365 F.2d 416, 418-419 (C.A.3), certiorari denied, 385 U.S. 958; *United States* v. *Trotta*, 401 F.2d 514, 516 (C.A. 4), certiorari denied *sub nom. Genovese* v. *United States*, 394 U.S. 908; *United States* v. *McKinnon*, 426 F.2d 845, 849-850 (C.A. 5), certiorari denied, 400 U.S. 868; *United States* v. *White*, 488 F.2d 563, 564-566 (C.A. 6); *O'Reilly* v. *United States*, 486 F.2d 208, 210-211 (C.A. 8), certiorari denied, 414 U.S. 1043; *United States* v. *Stout*, 434 F.2d 1264, 1266-1267 (C.A. 10).

3. Although *Murray's Lessee* is the only decision of this Court squarely holding that the Treasury's warrantless seizure of a delinquent taxpayer's property does not violate the Fourth Amendment,[19] the proposition finds additional support in the Court's decisions sustaining the right of the government to collect taxes by summary administrative proceedings. As the Court stated in *Bull* v. *United States*, *supra*, 295 U.S. at 260, a tax "assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt." See also *Cheatham* v. *United States*, 92 U.S. 85, 87-90; *State Railroad Tax Cases*, 92 U.S. 575, 612-615; *Graham* v. *duPont*, 262 U.S. 234, 255. It is equally well settled that while the underlying merits of a tax assessment are potentially subject to judicial scrutiny, it is presumptively correct. See, *e.g.*, *United States* v. *Rexach*, 482 F.2d 10, 15-18 (C.A. 1), certiorari denied, 414 U.S. 1039; *Crosby* v. *United States*, 496 F.2d 1384, 1390 (C.A. 5); *Psaty* v. *United States*, 442 F.2d 1154, 1158-1161 (C.A. 3); *Plisco* v. *United States*, 306 F.2d 784, 786 and n. 2 (C.A.D.C.), certiorari denied, 371 U.S. 948. See also 26 U.S.C. 7426(c).

The underlying rationale of these decisions is that the very existence of government depends upon the prompt collection of the revenues. Thus, in *Phillips*

[19] See also *Mason* v. *Rollins*, 16 Fed. Cas. 1061 (No. 9,252) (C.C. N.D. Ill.); *Hogan* v. *Ingle*, 12 Fed. Cas. 311 (No. 6,583) (C.C. D.C.); *Camden County Beverage Co.* v. *Blair*, 46 F.2d 648 (D. N.J.); *In re Meador*, 16 Fed. Cas. 1294 (No. 9,375) (N.D. Ga.); *State* v. *Marshall*, 100 Miss. 626, 646, 56 So. 792, 797.

v. *Commissioner*, 283 U.S. 589, 596-597, a unanimous Court rejected a constitutional challenge to the statutory system under which taxes may be collected summarily without a pre-seizure judicial hearing. The Court held that the statute met the requirements of due process as long as there was an adequate opportunity for a post-seizure determination of the taxpayer's legal rights. See also *Fuentes* v. *Shevin*, 407 U.S. 67, 92 and n. 24; *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 611-612. Accord: *Commissioner* v. *Shapiro*, No. 74-744, decided March 8, 1976, slip op. 15-16;[20] *United States* v. *Heck*, 499 F.2d 778, 792-793 (C.A. 9); *Sandnes' Sons, Inc.* v. *United States*, 462 F.2d 1388, 1392 (Ct. Cl.) (dictum).

If, as those decisions indicate, the collection of taxes by summary administrative proceedings without a pre-seizure judicial hearing is constitutionally justified because of the government's urgent need to secure its revenues, that policy equally supports the

[20] A taxpayer subject to a levy pursuant to a jeopardy assessment such as in this case does have an adequate post-seizure judicial remedy. Apart from his right to seek a redetermination of the deficiency in the Tax Court (cf. *Laing* v. *United States*, *supra*, No. 73-1808, decided January 13, 1976 (Brennan, J., concurring at slip op. 3)), the taxpayer may bring an immediate action to enjoin the Commissioner from collection and seek to overcome the bar of the Anti-Injunction Act, 26 U.S.C. 7421, by demonstrating irreparable injury and that under no circumstances will the government prevail on the merits of its claim. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7. As the Court stated in *Commissioner* v. *Shapiro*, *supra*, No. 74-744, decided March 8, 1976, this standard "is at least as favorable to the taxpayer as that required by the Constitution" (slip op. at 17). See also *New Hampshire Fire Insurance Company* v. *Scanlon*, *supra*, 362 U.S. 404, 406-408.

government's right, when circumstances so demand, to make such seizures without obtaining a judicial warrant. While these cases turned on due process rather than on Fourth Amendment considerations, it is significant that the Court in *Phillips* cited *Murray's Lessee* with approval as a case which sustained "[p]roceedings more summary in character * * *" and "involving less directly the obligations of the taxpayer * * *" (283 U.S. at 596).

C. *Long Before the Adoption of the Fourth Amendment, Delinquent Taxpayers in England and America Were Subject to Warrantless Seizures of Their Property in Aid of the Collection of Taxes*

1. The longstanding congressional authorization of warrantless seizures of a delinquent taxpayer's property by the tax collector does not *per se* abridge the Fourth Amendment, even where, as here, there is an entry into the taxpayer's business premises for the purpose of searching for and seizing his property. As we shall discuss below, it was well established at common law that a sheriff could forcibly enter a nonresidential building and seize its contents to execute a judgment in a private case. Moreover, in executing a judgment on behalf of the sovereign, the sheriff was also empowered at common law to enter residential premises. In empowering the Treasury to collect by levy and distraint, it is hardly likely that Congress intended the Treasury to be subject to any greater restrictions in enforcing collection than existed at common law. We therefore submit that such seizures would violate the Fourth Amendment only if they were used under the guise of tax collection

while their purpose was in fact investigatory or if they were carried out in an unreasonable manner. As we point out in greater detail in Point I.F, *infra*, pp. 72-76, neither circumstance exists in this case.

The common law practice and statutes, antedating the Fourth Amendment, as well as the history of the adoption of that constitutional provision, confirm that the Fourth Amendment was not intended to limit the Treasury's power to conduct warrantless entries into the business premises of delinquent taxpayers for purposes of seizing property to satisfy unpaid taxes. As this Court recognized in *Palmer* v. *McMahon*, 133 U.S. 660, 670, involving the collection by seizure of state taxes, "[c]ollection by distress and seizure of person is of very ancient date," citing *Murray's Lessee*, *supra*, and a series of English statutes which date back to the thirteenth century. The English common law was so well established that by the sixteenth century Coke was able to state that "By order of the common law, the king for his debt had execution of the body, lands, and goods of the debtor." II Coke, *Institutes* 19 (1797 ed.).

Although Chapter VIII of the Magna Carta had restrained the Crown from seizing lands or rents "as long as the present goods and chattels of the debtor do suffice to pay the debt," this provision did not limit the basic power of the Crown to seize property of its debtors. For example, in 1266, the statute of 51 Hen. III, Stat. 4, recognized that the King had a right of distraint against the property

of his debtors. It provided the requirements that sheriffs and other officers were to observe in enforcing distress, including that "such Distresses be reasonable, after the Value of the Debt or Demand, and by the Estimation of Neighbors, and not by Strangers, and not outrageous." The statute of 33 Hen. VIII, c. 39, enacted in 1541, gave all "obligations" due the Crown the same status as debts of record. See Gilbert, *An Historical View of the Court of Exchequer* 110-128 (1738).

Thus, since at least the thirteenth century, the King's Exchequer had broad authority to issue writs authorizing immediate collection by means of distraint against the property of those indebted to the Crown. It has aptly been said that these writs amounted to "a combination of every species of compulsory process known to the law." Price, *Treatise on the Law of the Exchequer* 119 (1830).

It was likewise well established in England that such seizures could be executed by forced entry. At common law, a sheriff or similar official could make a forced entry into any building, including a personal residence, in execution of the king's process, as long as he "signify the cause of his coming, and * * * make[s] request to open [the outer] doors * * *." *Semayne's Case*, 3 Coke's Rep. (Fraser ed.), Part V, fol. 91a, 186-187, 77 Eng. Rep. 194, 195 (K.B., 1604).[21] Although at least since *Semayne's*

[21] See *The King* v. *Ford*, 4 Nev. and Manning 451 (K.B., 1835); *Reading* v. *Chew*, 3 Gt. Br. Tax Cas. 625 (1898). Accord, *Keith* v. *Johnson*, 31 Ky. (1 Dana) 604, 605; see *Syndacker* v. *Brosse*, 51 Ill. 357, 359-360; *Vanden Bogert* v. *May*, 334 Mich. 606, 611, 55 N.W.2d 115, 117-118. See also 38 Geo. III, c. 5, Sec. 17; 12 Halsbury's *Laws of England* (3d ed. 1955), *Distress*, pp. 196-198, Nos. 363-369.

This Court recognized this common law principle in *Miller* v. *United States*, 357 U.S. 301, where on the basis of *Semayne's Case* and other early English common law precedents, it held that when an officer has probable cause to make an arrest he may forcibly enter a personal residence or dwelling if he gives a "prior notice of [his] authority and purpose * * *" (357 U.S. at 313).

Case, a sheriff or other peace officer could not forcibly enter a personal residence or dwelling house to execute or distrain pursuant to a private debt or judgment,[22] he could forcibly enter a nonresidential building without a judicial warrant in order to execute a judgment in a private cause. See, *e.g.*, *Penton* v. *Brown*, 1 Keble 698, 83 Eng. Rep. 1193 (1664); *Hodder* v. *Williams*, [1895] 2 Q.B. 663; *Haggerty* v. *Wilber*, 16 Johns. 286, 8 Am. Dec. 321 (N.Y.); *Burton* v. *Wilkinson*, 18 Vt. (3 Washburn) 186, 189. See also ALI, Restatement of the Law of Torts 2d, § 208 (1965). *A fortiori*, he could have forcibly entered a business premises as the revenue agents did in this case to collect a debt for taxes due to the Crown. Indeed, as we point out *infra*, pp. 63-64, the Internal Revenue Service's instructions to its agents adopt this common law distinction between personal

[22] See, *e.g.*, The 13th Yearbook of Edward IV (1461-1483), fol. 9, paraphrased in *Miller* v. *United States*, *supra*, 357 U.S. 301, 307; *Curtis* v. *Hubbard*, 4 Hill 437 (N.Y. Sup. Ct.); *Groves* v. *Bloxom*, 3 Houst. 544 (Del. Super. Ct.); *Sutton* v. *Allison*, 47 N.C. (2 Jones Law) 339; *Hooker* v. *Smith*, 19 Vt. (4 Washburn) 151; *Keith* v. *Johnson*, *supra*; *Syndacker* v. *Brosse*, *supra*; *State ex rel. McPherson* v. *Beckner*, 132 Ind. 371, 31 N.E. 950.

residences and business premises which is applicable to private judgments.

2. Warrantless seizure of a taxpayer's property to collect taxes also was authorized by various revenue statutes enacted in America prior to the ratification of the Constitution. Those statutes permitted the collector of the revenues to levy and distrain against a person's property when he neglected or refused to pay the taxes assessed against him.

For example, a Massachusetts Act provided that where "any person shall refuse to pay the sum or sums which he shall be assessed as his proportion to any rate or tax * * *, it shall and may be lawful to and for such * * * Collector, and he is hereby authorized and required, in such case, to distrain the person so refusing by his goods or chattels." Act of March 16, 1786, Sec. 2 (1 Perpetual Laws of Massachusetts (1780-1800), pp. 303, 304).[23] This provision was enacted six years after the Massachusetts Declaration of Rights, which prohibited "unreasonable searches and seizures" (Article XIV) and was a precursor of the Fourth Amendment. See Landynski, *Search and Seizure and the Supreme Court* 38-39 (1966).

The enactment of this Massachusetts statute in-

[23] The Massachusetts statute provided that the collector would be given written authority from the selectmen or assessors of the town or district to collect the taxes entered on the assessor's "list." Act of March 16, 1786, Secs. 1, 2 (1 Perpetual Laws of Massachusetts (1780-1800) pp. 303, 304). If a taxpayer refused to pay the assessed tax, his goods and chattels were to be levied upon by the collector and sold after four days.

dicates that such summary collection procedures were not deemed to be inconsistent with the principles eventually set forth in the Fourth Amendment's prohibition against "unreasonable searches and seizures." Indeed, similar powers of levy and distraint were given to tax collectors in each of the original states which had adopted a prohibition against unreasonable searches and seizures in its declaration of rights.[24]

The history of the Pennsylvania experience deserves special emphasis. In that State, administration of the revenue laws was vested in the commissioners and assessors of each county. Initially, the

[24] See, *e.g.*, Act for Ascertaining What Property in this State shall be Deemed Taxable Property, The Method of Assessing the Same, and Collecting Public Taxes, Laws of North Carolina (1715-1800), pp. 429, 431 (Iredell 1791); Act for Raising a Supply of Money for Public Exigencies, 9 Hening's Virginia Statutes (1775-1778), p. 358 (October, 1777); An Act to Raise the Supplies for the Year Seventeen Hundred and Eighty-Two, Secs. LXIII, LXIX, Laws of Maryland (1780-1783), May, 1781, c. IV; Act of February 11, 1791, Laws of New Hampshire (1797), pp. 213-214; Act of December 10, 1796, Laws of New Hampshire (December 1796), p. 4. The Massachusetts and Pennsylvania statutes are described above in the text. See also Act of October 17, 1797, c. 25, 1797 Vermont Laws Revised, pp. 335-337; Act Empowering Collectors to Collect Rates, Vermont State Papers and Laws (1779-1786), pp. 312-313.

Three others of the original States, which did not have prohibitions against unreasonable searches and seizures, had similar statutes empowering their tax collectors to levy upon and seize property. See, *e.g.*, Act of March 7, 1788, Sec. II, Laws of New York (1787-1789) (2 Jones & Varick, p. 341 (1789)); Act of February 27, 1788, 5 Stat., South Carolina (1839 ed.), No. 1383, pp. 52-53; An Act for Collecting and Paying Rates or Taxes, Acts and Laws of Connecticut (1784), pp. 197, 202.

Pennsylvania statute conferred extremely broad powers on the collector of taxes, who was authorized "to break open, in the day time, any house, trunk, box, chest, closet, cup-board or other things, where any such offender's goods and chattels or effects are supposed to be, and make distress and sale thereof * * *." Act of March 27, 1782, 2 Pennsylvania Laws (1781-1790), pp. 4, 12, Sec. XXIV.

For the express purpose of conforming these powers to Article X of the Pennsylvania Declaration of Rights of 1776 (which proclaimed freedom from unreasonable search and seizure and was thus another predecessor of the Fourth Amendment),[25] the Pennsylvania legislature amended the statute in 1785 to prohibit revenue collectors from forcibly entering "any dwelling-house" without first securing a warrant.[26] Act of April 5, 1785, 2 Pennsylvania

[25] See Lasson, *The History and Development of the Fourth Amendment*, p. 81 (1937).

[26] The purpose of the amendment is set forth in the preamble to the statute. The amended version of the Pennsylvania statute was limited solely to the collector's authority to enter dwellings. It did not alter the statutory authority of the collector to seize any other assets belonging to a delinquent taxpayer, without a warrant, by summary administrative means. Under state statutes deemed compatible with the Pennsylvania analogue of the Fourth Amendment, a collector was free to enter commercial property or any other building that was not a personal residence without first securing a judicial or even an executive warrant. See Lasson, *The History and Development of the Fourth Amendment*, *supra*, p. 81. In addition, in cases involving a personal residence, where an administrative warrant was required, it was not incumbent upon the collector to establish the validity of the

Laws (1781-1790), pp. 306, 307. Section II of the 1785 Act, however, specifically authorized the county commissioners, who, rather than judicial officers, were vested with principal responsibility for the administration of the revenue acts,[27] to issue warrants for this purpose with respect to the collection of various taxes.

This latter authorization is particularly significant to the question presented in this case, since it shows that the Pennsylvania legislature did not regard the issuance of a warrant by the executive officials administering the revenue laws as violating the principle of freedom from unreasonable searches and seizures embodied by the Pennsylvania Declaration of Rights.[28] This statute thus reflects the con-

assessment made against the taxpayer, but only that there was probable cause to believe that goods subject to levy were to be found in the residence. The distinction between dwelling houses and other buildings may have been based upon common law principles (see pp. 41-43, *supra*) or possibly upon the Pennsylvania legislators' understanding of James Otis' argument in the writs of assistance cases (see pp. 55-59, *infra*).

[27] See Act of March 27, 1782, 2 Pennsylvania Laws (1781-1790), pp. 4, 5-8, 10-12 (Secs. III, IV, VII, VIII, XIX, XXII and XXIII), concerning the administration and collection responsibilities of the county commissioners.

[28] In some States, the early statutes provided that the tax officials were to turn over unpaid assessments to constables, sheriffs, or other peace officers, who were then directed to distrain pursuant to the assessment and the writ or warrant given by the tax officials. See, *e.g.*, Act of October 17, 1797, c. 25, 1797 Vermont Laws Revised, pp. 335-346; Act of February 27, 1788, 5 Stat., South Carolina (1839 ed.), No. 1383, pp. 50-57; An Act for Collecting and Paying Rates or Taxes, Acts and Laws of Connecticut (1784), pp. 197-204.

temporary understanding that the common law principles permitting seizure of property from residential or nonresidential premises to collect taxes without a judicial warrant did not violate the constitutional prohibition against unreasonable searches and seizures that was soon to be formally adopted as the Fourth Amendment.

Since those procedures had long been embodied in common law and state constitutional principles, it is understandable that this Court in *Murray's Lessee* later deemed them to be compatible with the Fourth Amendment.[29] Indeed, the history of this Pennsylvania statute confirms Professor Taylor's observation with respect to the original understanding of the Fourth Amendment that "our constitutional fathers were not concerned about warrantless searches, but about overreaching warrants." Taylor, *Two Studies in Constitutional Interpretation* 41 (1969). See also Lasson, *supra*, *The History and Development of the Fourth Amendment* 51-78 (1937); Landynski, *Search and Seizure and the Supreme Court* 30-42 (1966).

[29] The defendants' brief in *Murray's Lessee* stated that the statutes of each of the 31 then-existing States authorized tax assessments and levies without resort to judicial proceedings. See Brief for Defendants, *The Hoboken Land and Improvement Co.* v. *Den ex dem. Murray and Kayson*, No. 54 December Term, 1855, p. 5.

D. *The Fourth Amendment Was Not Intended to Limit the Treasury's Power to Make Warrantless Seizures of Property of Delinquent Taxpayers*

1. a. Just as various States in the first years of emergence from their status as English colonies enacted prohibitions against unreasonable searches and seizures but nevertheless empowered their tax collectors to seize property without a judicial warrant, the Framers of the Constitution likewise saw no inconsistency between the guarantee of the Fourth Amendment and the statutory authority of the Treasury to collect revenues by summary means. They recognized that the power of taxation was "the most important of the authorities proposed to be conferred upon the Union" (*The Federalist* No. 33, p. 205 (Cooke ed., 1961)).

As a result, they included the authority "to lay and collect taxes" in Article I, Section 8, of the Constitution as one of the enumerated powers of the federal government.[30] The Founding Fathers thereby

[30] One of the principal defects in the Articles of Confederation was that the central government lacked the authority to impose and collect taxes and was thereby dependent on the States for its revenues. See *The Federalist*, *supra*, Nos. 15, 21, 23, 30, pp. 93, 132, 148-149, 188-190. Article VIII of the Articles of Confederation provided that "The taxes * * * shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled." Although a call for revenues by the central government was conceived "in every constitutional sense [as] obligatory upon the States," (*The Federalist*, *supra*, No. 30, p. 189) this system in fact resulted in the impoverishment of the central government because the States in practice used their intermediate role in

vested the "Federal government * * * with an unqualified power of taxation in the ordinary modes" (*The Federalist, supra,* No 31, p. 196). They also viewed the authority to collect taxes by summary administrative action as "essential to the efficacy of the revenue laws" and necessary to meet the "exigencies of the public." *The Federalist, supra,* No. 83, p. 563.

From the very beginnings of the Republic, the statutory power of seizure now set forth in Section 6331 of the current Code was regarded as a necessary and proper exercise of the congressional taxing power. As we point out below (pp. 54-55), this consistent legislative view is of considerable significance in establishing the constitutional validity of the practice.

The First Congress, which also proposed adoption of the Bill of Rights, provided that taxes could be "levied by distress and sale of goods of the person or persons refusing or neglecting to pay." Act of March 3, 1791, c. 15, Sec. 23, 1 Stat. 199, 204. See also Act of July 31, 1789, c. 5, Secs. 12, 26, 27, 1 Stat. 29, 39, 43-44; Act of August 4, 1790, c. 35, Secs. 27, 28, 50, 1 Stat. 145, 163-164, 170. As shown by this Court's decision in *Abel* v. *United*

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the tax collection process as a means of questioning the central government's claim for revenues. As a result, the proponents of the new federal system believed it was essential that the revenue laws of "the Federal Government * * * [be imposed directly on] the individual citizens of America." *The Federalist, supra,* No. 23, p. 148. See also *The Federalist, supra,* No. 15, p. 93.

States, 362 U.S. 217, and most recently in *United States* v. *Watson,* No. 74-538, decided January 26, 1976, the views of the early Congresses constitute particularly persuasive authority regarding the types of searches and seizures that were barred by the Fourth Amendment. Indeed, since the First Congress, every subsequent Congress that enacted an internal revenue statute afforded similar levy and distraint powers to the Treasury in order to enforce collection.[31] This consistent statutory authority reflects the

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[31] See, *e.g.,* Act of July 14, 1798, c. 75, Sec. 9, 1 Stat. 597, 600; Act of July 22, 1813, c. 16, Secs. 21, 22, 3 Stat. 22, 30-31; Act of December 21, 1814, c. 15, Sec. 5, 3 Stat. 152, 154; Act of January 9, 1815, c. 21, Sec. 26, 3 Stat. 164, 173; Act of January 18, 1815, c. 22, Sec. 5, 3 Stat. 180, 182-183; Act of January 18, 1815, c. 23, Sec. 9, 3 Stat. 186, 188-189. Shortly after the end of the War of 1812, all internal taxes were repealed (Act of December 23, 1817, c. 1, Sec. 1, 3 Stat. 401), and were not revived until the Civil War.

The internal revenue statutes enacted during the Civil War period likewise made it "lawful for * * * [the] collector, or his deputies, to proceed to collect the said taxes by distraint and sale of the goods, chattels, or effects of the persons delinquent." Act of August 5, 1861, c. 45, Secs. 35, 36, 12 Stat. 292, 303-304; Act of July 1, 1862, c. 119, Secs. 19-22, 12 Stat. 432, 439-442; Act of June 30, 1864, c. 173, Secs. 28-31, 13 Stat. 223, 232-236; Act of March 3, 1865, c. 78, 13 Stat. 469, 470-471; Act of July 13, 1866, c. 184, 14 Stat. 98, 106-109. These Civil War statutes generally separated the function of tax assessors, who were charged with ascertaining a taxpayer's liability, from the duties of the collector of the revenue. See Act of July 1, 1862, *supra,* Secs. 2-19. This distinction survives today as part of the present organization of the Internal Revenue Service.

The levy and distraint authority of collectors of the federal revenues was codified in Revised Statutes, Section 3187, and

unchanging legislative view that warrantless seizures of property in aid of the collection of revenues were compatible with the "reasonableness" requirements of the Fourth Amendment.

In empowering the Treasury to conduct seizures of property, Congress was surely aware that circumstances would arise in which such seizures could be accomplished only by forcible entry as in this case. But nowhere in any of the statutes is the seizure authority conditioned upon the issuance of a judicial warrant. Indeed, Sections 6331(b) and 7701(a)(21) of the current Code define the term "levy" as including the "power of distraint and seizure *by any means*" (emphasis supplied). While the phrase "by any means" was not included in the levy statute until the 1954 codification, the observation of the pertinent committee reports that Section 6331 "continues in effect the provisions of existing law relating to distraint and levy" (H.R. Rep. No. 1337, 83d Cong., 2d Sess. A408, A438 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 577, 619 (1954)) suggests that Congress was aware that the Treasury had long been authorized to employ a reasonable degree of force necessary to execute a seizure.

Finally, a comparison of the customs statutes with the internal revenue statutes enacted by the First Congress demonstrates that Congress knew how to

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this provision in turn was the predecessor of Section 3690 of the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.) and Section 6331 of the present Code.

impose a judicial warrant requirement when it wished to do so. Section 24 of the Act of July 31, 1789, c. 5, 1 Stat. 29, 43, the first customs statute, provided that the collectors had full authority "to enter any ship or vessel, in which they shall have reason to suspect any goods * * * subject to duty shall be concealed; and therein to search for, seize, and secure any such goods * * *." However, if the collector had reason to suspect that goods were concealed "in any particular dwelling-house, store, building, or other place," the statute provided that "they * * * shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for [and seize] such goods * * *." By requiring a judicial warrant only in those investigatory customs seizures conducted other than on ships and omitting such a warrant requirement with respect to seizures to collect assessed internal taxes, the First Congress manifested an intent not to require warrants for tax seizures.

b. The foregoing historical and statutory material confirms this Court's holding in *Murray's Lessee* that the Fourth Amendment was not intended to modify the common law right of the government to levy upon and seize a delinquent taxpayer's property without a judicial warrant in satisfaction of a specific tax debt. Section 6331 of the Code, which authorizes "distraint and seizure by any means," reflects a judgment by Congress from the earliest days of the Republic that the Fourth Amendment does

not prohibit the Internal Revenue Service from seizing property without a warrant if, upon notice and demand, a taxpayer fails or refuses to pay an assessed tax.

This statutory history and the common law tradition upon which it is based are of great significance. It was on the basis of a similar longstanding legislative judgment that the Court in *Abel* v. *United States*, *supra*, 362 U.S. 217, 232, sustained an administrative arrest made without "a judicial warrant within the scope of the Fourth Amendment * * *" and a search incident to that arrest. There, agents of the Immigration and Naturalization Service arrested Abel on an administrative warrant for deportation, searched his hotel room and seized certain articles which were later introduced into evidence at a criminal trial charging him with conspiracy to commit espionage. In upholding the arrest and the ensuing search incident to the arrest as compatible with the Fourth Amendment, the Court cited the "overwhelming historical legislative recognition of the propriety of administrative arrest for deportable aliens * * *" (*id.* at 233).

Similarly, in *United States* v. *Watson*, *supra*, No. 74-538, decided January 26, 1976, the Court relied upon comparable legislative action in holding that the Fourth Amendment did not bar postal inspectors from making warrantless arrests in public on probable cause. Since there is a "strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable'"

(*United States* v. *Di Re*, 332 U.S. 581, 585), we submit that a warrantless seizure made for the purpose of tax collection is also consistent with the Fourth Amendment.

2. There is no indication that the proponents of the Fourth Amendment equated warrantless seizures to collect specific debts of internal taxes with unreasonable searches and seizures. To be sure, the origins of the Fourth Amendment may be traced in part to the legal battles waged over the writs of assistance employed by the English Crown. But these writs were issued by the courts [32] for investi-

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[32] Since 1755, it was the Superior Court of Massachusetts which issued the writs of assistance over which this litigation took place. See Lasson, *The History and Development of the Fourth Amendment*, *supra*, at 55-56. Otis and the other advocates against the writs of assistance did not regard judicial warrants as an effective guarantee against unreasonable searches and seizures. As one commentator has observed: "Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches." Taylor, *Two Studies in Constitutional Interpretation*, *supra*, at 41. Significantly, Oxenbridge Thatcher, who also opposed the issuance of the writs of assistance, though less eloquently than Otis, simply argued that while such writs could properly issue from the Exchequer, the Superior Court did not have "Chancery Jurisdiction, which the Exchequer has, in cases where either party is the King's debtor," and therefore had no jurisdiction to issue writs of assistance. Charles Francis Adams, *The Works of John Adams*, Vol. 2, p. 521 (1850); Wroth and Zobel, eds., *Legal Papers of John Adams*, Vol. 2, pp. 138-139 (1965). In 1766, one of the Townshend Acts (7 Geo. III, c. 46, Sec. 10) accordingly conferred jurisdiction upon the Superior or Supreme Court of each province to issue writs of assistance,

gatory purposes and conferred upon officers unfettered authority of no fixed duration to conduct roving searches by entering any private dwelling in search of goods upon which duty had not been paid. While the writs of assistance were broadly related to the enforcement of the revenue laws of the Crown, they are quite unlike a tax collector's levy upon a delinquent taxpayer's property to collect a specific tax debt. The Fourth Amendment was intended to prohibit the former type of investigatory seizure without antecedent judicial intervention, but not a levy in aid of tax collection.

The distinction between the general investigatory writs of assistance and tax levies is confirmed by the fact that James Otis' celebrated argument against the writs of assistance in *Paxton's Case*[34] did not

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thereby making the courts themselves the continuing source of the colonists' resentment over the writs. See Lasson, *The History and Development of the Fourth Amendment, supra,* at 70.

[34] The complete text of Otis' argument is not available. *Paxton's Case,* Massachusetts Reports (Quincy) 51 (1761-1772), which is often referred to as the *Writs of Assistance* case, involved the application of Charles Paxton, "who bore the ominous title of Surveyor and Searcher of the Port of Boston," and of Thomas Lechmere, Surveyor General of the Customs, for issuance of writs of assistance by the Superior Court of Massachusetts. See Landynski, *Search and Seizure and the Supreme Court* 32-33 (1966); Wroth and Zobel, eds., *Legal Papers of John Adams,* Vol. 2, pp. 112-114 (1965). John Adams' account of the argument may be found in Charles Francis Adams, *The Works of John Adams,* Vol. 2, pp. 521-525 (1850), and in Wroth and Zobel, eds., *Legal Papers of John Adams, supra,* Vol. 2, pp. 123-144.

challenge the ultimate right of the government to collect its revenues without a judicial warrant once a determination had been made that an individual taxpayer was delinquent in his taxes. The gist of Otis' argument was that the writs of assistance were general in scope, that they were not returnable so that the holder was not accountable, and that they authorized all searches made by customs officers and their deputies. "The discretion delegated to the official was therefore practically absolute and unlimited." See Lasson, *The History and Development of the Fourth Amendment, supra,* p. 54.

Otis argued that the writs were illegal because their investigatory purpose rendered them inconsistent with the fundamental common law principle, which he identified as "The privilege of House." Charles Francis Adams, *The Works of John Adams, supra,* Vol. 2, at 521; Wroth and Zobel, eds., *Legal Papers of John Adams, supra,* Vol. 2, at 125. As Otis argued, the writs encroached on the "freedom of one's house," since "no man, no court" could inquire whether there was a basis for a search made pursuant to them. He therefore urged that the only type of writ that was proper was a "special writ of assistance," which would be granted on oath and would authorize the search of particular houses. See Wroth and Zobel, eds., *Legal Papers of John Adams, supra,* Vol. 2, at 142. This special writ envisioned by Otis was the antecedent of the modern search warrant, issued on probable cause.

Apart from the fact that Otis spoke against the background of the common law which had long au-

thorized both the Crown and private creditors to dispatch the sheriff to seize property of their delinquent debtors (see pp. 41-43, *supra*), the vices of the writs of assistance which he described bear no resemblance to the collector's seizure of a tax debtor's property. Unlike the broad sanction for investigatory searches conferred by the writs of assistance, a tax levy is not investigatory in character but proceeds upon the existence of a specified debt of which the taxpayer is well aware, since demand for payment has already been made upon him. Moreover, the collector does not act with unbridled discretion but is empowered to seize only an amount of property sufficient to satisfy the debt.

To be sure, Otis' opponent, Gridley, sought to justify the writs of assistance by analogizing them to "the Method of collecting Taxes in this Province." Wroth and Zobel, eds., *Legal Papers of John Adams*, *supra*, at 130. But Gridley's proposed analogy does not establish that the writs of assistance were equivalent to tax levies. On the contrary, his analogy demonstrates that the government's power to execute tax seizures for specific debts was well established and not questioned by Otis.[34] Indeed, as we have noted (pp. 44-45, *supra*), each state that subsequently adopted a constitutional prohibition against unreasonable searches and seizures continued to maintain its statutory right to execute tax levies.

[34] The procedure for taking and selling property for nonpayment of taxes was authorized under the laws of the Province of Massachusetts. See Act of 3 October 1730, c. 1, Secs. 12, 13, 2 Acts and Resolves 552-553. Adams' account of Otis' argument does not contain any refutation of Gridley's analogy to the tax seizure power.

In sum, Otis' historic challenge to the English writs of assistance provides additional support for our argument that the Fourth Amendment was not intended to impose a judicial warrant requirement upon the execution of tax levies.

3. Finally, it is significant that James Madison, who was the principal sponsor of the Bill of Rights in the First Congress, recognized the distinction subsequently made by the Court in *Boyd* between general investigatory warrants to enforce the revenue laws and a levy to collect a specific debt for taxes previously determined to be owed. In answer to the argument that the Bill of Rights was unnecessary because the powers of the federal government were enumerated, Madison emphasized the evil of the general warrant and equated the prohibitions against the state governments provided by the declarations of rights of the various States with those provided by the Bill of Rights. He stated (1 Annals of Congress 438 (1834 ed.)):

> Now, may not laws be considered necessary and proper by Congress, (for it is for them to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation,) which laws in themselves are neither necessary nor proper; as well as improper laws could be enacted by the State Legislatures, for fulfilling the more extended objects of those Governments? I will state an instance, which I think in point, and proves that this

might be the case. The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.

Madison's emphasis upon the general warrant and his reference to the prohibitions against them in the declarations of rights of the States again demonstrate that it was the abuse of the general warrant, which authorized investigatory intrusions by the tax collector, and not abuse of the levy power that prompted the adoption of the Fourth Amendment. As we have pointed out (*supra*, pp. 44-48), the power of the state tax collectors to levy upon and seize the property of delinquent taxpayers to satisfy a specific debt was considered to be compatible with the state prohibitions against "unreasonable searches and seizures." Since the authority of the new central government to collect its debts by summary means was no more limited than that of the States, the Fourth Amendment was not intended to limit the power of the federal government to levy upon and seize property to satisfy unpaid tax obligations by requiring antecedent magisterial authorization for such seizures.

E. *The Reasons for Requiring a Warrant Prior to an Investigative Search are Inapplicable to the Seizure of the Taxpayer's Property in This Case*

1. In addition to the foregoing historical and statutory evidence which demonstrates that the Fourth Amendment did not extend the warrant requirement to the seizure of a delinquent taxpayer's property, there are also persuasive policy reasons why a warrant requirement would be inappropriate in this type of case. As the Court stated in *Cady* v. *Dombrowski*, *supra*, 413 U.S. at 439, "The ultimate standard set forth in the Fourth Amendment is reasonableness. In construing this command, there has been general agreement that 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant' *Camara* v. *Municipal Court*, 387 U.S. 523, 528-529 (1967). See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-455 (1971)."

One of those classes of cases in which a warrant is not required is where the officer reasonably believed that the delay in obtaining a warrant would threaten the destruction of evidence (see *Preston* v. *United States*, 376 U.S. 364, 367; *Schmerber* v. *California*, 384 U.S. 757, 770-771), or where other exigent circumstances justify immediate action. See *Warden* v. *Hayden*, 387 U.S. 294, 298-299. This case comes within the exigent circumstances exception to the warrant requirement.

Here, the taxpayer refused to cooperate with an audit, concealed some of his assets in petitioner,

a sham corporation, and became a fugitive from justice. Prior to the seizure, the revenue agents observed various persons removing boxes of material from petitioner's business premises. In addition, a valuable automobile had disappeared from the garage adjoining petitioner's office (see A. 83).[35] Thus, any further delay incident to obtaining a judicial warrant could have entirely frustrated the Service's collection efforts against the taxpayer's assets held by petitioner. The movable character of petitioner's property required that the Internal Revenue Service take immediate action and seize it pursuant to its authority under Section 6331 in order to satisfy in part its assessment against Norman.

Accordingly, the jeopardy assessment authorizing immediate collection and the ensuing seizure of the automobiles from various open locations and the contents of petitioner's business premises was, as a practical matter, the only remedy left to the Service if the government's vital interest in collecting its tax claim from the taxpayer's property was not to be defeated. Under more normal circumstances, even when involuntary collection procedures are necessary, the government can temporarily protect its interest by filing notices of the lien created by the assessment pursuant to Section 6321 of the Code. See Section 6323(a) and (f). Here, however, that course of action was not a meaningful remedy because neither petitioner G. M. Leasing Corporation nor the taxpayer Norman held any property (such as real estate) against which the filing of a lien would have effectively prevented their transfer. Finally, although the Service usually can summon a delinquent taxpayer to give testimony concerning the extent and location of his assets (see Section 7602 of the Code), that was impossible in this case because the taxpayer had become a fugitive from justice.

[35] The Stutz automobile located in the garage adjoining the cottage, which was removed prior to the seizure of the cottage, was subsequently recovered by the Service at another location (A. 83).

2. The exigent circumstances of this case are illustrative of one type of situation in which the Internal Revenue Service exercises its statutory power of levy and seizure to collect unpaid tax assessments. As we have pointed out *supra*, pp. 21-22, most tax levies involve nothing more than the service of notice to the delinquent taxpayer or to persons holding his property or property on which there is a tax lien. The Service generally prefers to reach an agreement with a delinquent taxpayer as to how he intends to pay his liability. Such an agreement may include the filing of liens to protect the government against the taxpayer's disposition of his property.

But a fair and effective payment plan cannot be concluded by the Service unless the taxpayer fully cooperates with the collection officer and renders a complete account of his assets and liabilities. In the event that the taxpayer refuses to cooperate or there is an indication that he is putting his property beyond the reach of the collector, the Service has no choice but to seize whatever assets may be available.

In exercising its seizure power, however, the Service is scrupulously careful to take only property belonging to the taxpayer and to avoid taking any action that might be considered to be inappropriate or unduly harsh. The Service advises that the procedural guidelines set forth in the manual for its collection officers (see Appendix B, *infra*, pp. 11a-15a) prohibit its agents from using any physical force against any person in connection with the seizure of the taxpayer's property. Moreover, the officers are instructed not to attempt forcible entry into a personal residence over the objection of the person occupying the premises or to change the locks of a personal residence without permission.[36]

Since Internal Revenue Service levies are conducted for the narrow purpose of obtaining possession of property of a delinquent taxpayer and not for gathering evidence, we submit that the Fourth Amendment warrant requirement should not be applied to such seizures. As the Court put it in *Johnson* v. *United States*, 333 U.S. 10, 14, which is quoted with approval in *Coolidge* v. *New Hampshire*, *supra*,

[36] The Service also advises that, as a matter of policy, it does not levy upon and seize a taxpayer's books and records under Section 6331 for the investigatory purpose of obtaining evidence of civil tax liability or of a criminal tax violation. The facts of this case reflect this policy. Here, the assessments against Norman were made prior to the seizure of petitioner's books and records. Moreover, nothing in the records seized by the Service from petitioner's business premises was used to compute the assessment against Norman for 1971 (A. 30). Thus, any role that the Fourth Amendment may play in restricting the investigatory use of seized property is irrelevant here.

403 U.S. at 449, the Fourth Amendment's "protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the *officer engaged in the often competitive enterprise of ferreting out crime*" (emphasis supplied). Because the seizures by the collection agents in this case affected only proprietary as opposed to privacy interests (which would be implicated in an investigatory search) in their seizure of petitioner's property, the rationale for a judicial warrant is inapplicable. Simply stated, the purpose of an Internal Revenues Service levy and seizure is unrelated to an investigatory search in the "traditional criminal law context." *Wyman* v. *James*, 400 U.S. 309, 317.

Finally, the Court has explained the requirement for a judicial warrant particularly describing the things to be seized in an investigatory search as a means of insuring that "nothing is left to the discretion of the officer executing the warrant." *Marron* v. *United States*, 275 U.S. 192, 196. See also *Berger* v. *New York*, 388 U.S. 41, 59. But this principle has little force in a case where the collection agents are directed by Section 6331 of the Code to "levy upon all property and rights to property * * * belonging to such person or on which there is a lien * * *."

Indeed, Section 6334 of the Code specifically exempts from levy an enumerated list of items deemed to be necessities of life. Thus, the collection agents have little discretion as to what property to seize in executing a levy. Since the pertinent statute empowering such seizures thus limits the discretion of

the agents, there is no need for a judicial warrant to accomplish the same objective.

3. a. Contrary to petitioner's contention (Br. 31-32), the foregoing analysis is consistent with *Camara* v. *Municipal Court*, 387 U.S. 523, and *See* v. *City of Seattle*, 387 U.S. 541. In *Camara*, the Court held that the Fourth Amendment barred prosecution of one who refused to allow a warrantless housing code enforcement inspection of his personal residence. The companion *See* decision extended this rule to similar inspections of commercial structures not used as residences.

The Court's opinions in those cases indicated that three basic considerations are critical in determining whether warrants are constitutionally required in the inspection context: the demands of privacy, the public need for warrantless searches, and the standards to be employed in issuing warrants. Here, we submit, these considerations support the validity of the warrantless levy and seizure procedures which Congress has authorized in Section 6331 of the Internal Revenue Code.

Of critical concern to the Court in *Camara* and *See* was the danger that the broad inspection authority exercised in those cases gave too much discretion to the officers in the field (see 387 U.S. at 532-533). But an entirely different situation is presented here, where a revenue collection officer making a levy and seizure has only specific and limited authority under Section 6331 of the Code and is not empowered to conduct a general, exploratory search

(See pp. 65-66, *supra*). Cf. *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 467.[37]

Congress was amply justified in concluding that the competing ends of privacy of a delinquent taxpayer and effective protection of the government's revenues would best be served by providing that judicial review of any particular levy occur after the fact rather than requiring the prior approval of a magistrate. See 26 U.S.C. 7421(a).

The considerations of effective tax collection appear to outweigh whatever privacy interests may be deemed to exist in this case since the agents' entry was not into a personal residence that is accorded the "full range of Fourth Amendment protections" (*Lewis* v. *United States*, 385 U.S. 206, 211) but into the business premises of a sham corporation against which the state could presumably exercise its visitorial inspection power to investigate its activities (see *Hale* v. *Henkel*, 201 U.S. 43, 74-75; *Bellis* v. *United States*, 417 U.S. 85, 89). Indeed, petitioner appears to acknowledge as much in its complaint, which states that the premises were owned by Real Estate, Inc. (see n. 5, *supra*) and that the "office was used by [petitioner] not only to store their records, but also as offices of operation" (A. 118).

The second pertinent area of inquiry specified in *Camara* and *See*—"whether the burden of obtaining a warrant is likely to frustrate the governmental

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[37] The narrow authority of a revenue agent executing a levy is illustrated by the facts of this case, where the agents removed and inventoried everything from petitioner's premises (A. 86).

purpose behind the search" (*Camara*, *supra*, 387 U.S. at 533)—also supports the present statutory scheme. Congress was dealing with the exigencies of tax collection against persons who had demonstrated their refusal to meet their obligations. Such persons, like the taxpayer Norman, are often likely to attempt to put their property beyond the reach of the tax collector. Thus, if warrants were to be sought only after entry is refused, as suggested in *Camara*, *supra*, 387 U.S. at 539, the essential governmental purpose of collecting the revenue would be frustrated. The delinquent taxpayer who has avoided payment of his liability would be likely to utilize the time thereby afforded to conceal or otherwise dispose of his property. The substantial disadvantages to the revenue of using a warrant procedure in the tax collection area justify Congress' authorization of levy and seizure of a delinquent taxpayer's property without warrants.

The third consideration discussed in *Camara* and *See* was the standards for determining whether to issue warrants. There, the reasonableness of searches was dependent principally on the time since the last previous inspection and the physical conditions of the general area (see *Camara*, *supra*, 387 U.S. at 535-538). These considerations, however, have no relevance to the situation here.

The physical conditions in the general area and the passage of time are unrelated to the government's need to levy upon and seize the property of a delinquent taxpayer. In such a situation, the existence of the liability rests upon the presumption of correct-

ness as evidenced by the assessment (see p. 38, *supra*). The fact of the taxpayer's ownership of the property to be seized is usually a matter of public record or is manifested by the location of the property.[38] Thus, the only factors for deciding whether to make such a levy is whether the taxpayer has refused to meet his obligation and whether he has property which could be used to satisfy the outstanding assessments. There are accordingly almost no questions of disputed fact in a tax seizure with respect to which the antecedent evaluation of a magistrate would be required.

b. To the extent that this case resembles any of the administrative searches considered by this Court, it is far closer to *United States* v. *Biswell*, 406 U.S. 311. There, the Court held that a warrantless search of a locked storeroom as part of a gun control inspection procedure authorized by 18 U.S.C. 923(g), which resulted in the seizure of unlicensed firearms from a gun dealer, did not violate the Fourth Amendment. While federal regulation of firearms was not deeply rooted as a historical matter, the Court sustained warrantless inspection because the regulation of guns was of central importance in the prevention of violent crime.

Colonnade Catering Corp. v. *United States*, 397 U.S. 72, also supports our position here. In that case, the Court considered the statutory authoriza-

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[38] If the Service has erroneously seized a third party's property in satisfaction of a tax assessment, Congress has provided a statutory right of action, which is an exception to the Anti-Injunction Act, 26 U.S.C. 7421. See 26 U.S.C. 7426.

tion for warrantless inspections of federally-licensed dealers in alcoholic beverages. Federal inspectors, without a warrant and without the owner's permission, had forcibly entered a locked storeroom and seized illegal liquor. After reviewing the history of federal control in the area of alcoholic beverages, the Court concluded that Congress had long exercised control over the liquor industry and had ample power "to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand" and could have authorized such inspections by means of forcible entry (397 U.S. at 76). However, it held that the particular inspection was beyond the scope of the statute because Congress had not expressly provided for forcible entry in the absence of a warrant but had instead given the government agents a remedy by making it a criminal offense under 26 U.S.C. 7342 to refuse admission to the inspectors.[39]

[39] Unlike the liquor inspection statute at issue in *Colonnade Catering*, Congress has not made it a criminal offense for a delinquent taxpayer merely to refuse admission to a revenue collection officer seeking entry to private premises for the purpose of levy and seizure.

In addition to the liability for the entire amount of taxes due and owing provided by Section 6332(c)(1), Section 6332(c)(2) of the Code provides for personal liability for the taxes owed plus a 50 percent penalty upon "[a]ny person who fails or refuses to surrender any property or rights to property, subject to levy * * *." However, the Internal Revenue Service has advised that it interprets this penalty provision as applying only to property of a delinquent taxpayer in the possession of a third party and not to property in the taxpayer's possession. In the Service's view, this interpretation is consistent with Section 6332(c)(1) of the Code, which applies only to

To be sure, *Biswell* and *Colonnade Catering* turn in part on the fact that firearms and liquor dealers have implicitly consented to a detailed system of governmental regulation. But the decision in *Biswell* also reflects the Court's recognition that the gun inspection powers at issue were necessary to implement a regulatory system of crucial importance to society. Here, too, the collection of the revenues is of paramount importance. Indeed, if the Service's levy and seizure procedure is to be an effective means of collecting taxes against persons who are likely to hide or otherwise dispose of their property, unannounced levies are essential to the statutory scheme. "In this context, the prerequisite of a warrant could easily frustrate [the levy procedure]; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible." *United States* v. *Biswell*, *supra*, 406 U.S. at 316. Thus, the Court in *Biswell* had "little difficulty in concluding that where * * * regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute." *Id.* at 317.

In sum, the historical rationale of *Colonnade Catering* and the practical-necessity analysis of *Biswell*

third persons, as well as with the legislative history of both subsections (c)(1) and (c)(2). See S. Rep. No. 52, 69th Cong., 1st Sess. 38 (1926); and H.R. Rep. No. 1884, 89th Cong., 2d Sess. 17 (1966). See also *United States* v. *Aetna Life Ins. Co.*, 46 F. Supp. 30, 37 (D. Conn.).

support the validity of warrantless tax-collection levy and seizure from business premises.

F. *The Conduct Of The Revenue Agents In Executing The Levy And Seizure In This Case Was Reasonable*

We have shown that the statutory procedure for warrantless tax levies and seizures of a delinquent taxpayer's property does not violate the Fourth Amendment. The question remains whether that statutory authority was validly implemented in this case in light of the forced entry into petitioner's business premises.[40] It is our position that the procedure followed here was within the Service's statutory authority and satisfied the reasonableness requirement of the Fourth Amendment.

1. In enacting the levy and seizure statute, Congress provided a mechanism by which the Treasury could enforce collection against recalcitrant taxpayers. Congress did not intend this collection procedure to be frustrated if the taxpayer placed his property behind locked doors. Indeed, if that were the case, it would be a relatively simple matter for a delinquent taxpayer to insulate himself against any forced collection procedure. Moreover, in the absence of any criminal sanction for such conduct, a delinquent taxpayer would have no reason to discharge his obligations if he thought that the Service

[40] The levy upon and seizure of petitioner's automobiles was plainly reasonable. Indeed, petitioner does not even allege (A. 121) that the agents entered any private premises much less resorted to forcible entry in asserting possession over the cars. Under these circumstances, the seizure of the automobiles from what were apparently open places did not violate the Fourth Amendment (See pp. 30-37, *supra*).

could not summarily collect the tax from his property.

Thus, Congress must have intended that a reasonable degree of force could be employed to gain access to a delinquent taxpayer's premises where necessary to accomplish a seizure of his property to collect taxes he owes. The reasonableness of an entry to make a levy and seizure depends upon whether excessive force was used in gaining entry or seizing the property.

The revenue agents acted reasonably here in using a limited degree of force to gain entry to petitioner's business premises. After their first entry into the cottage indicated that it might be a personal residence, the agents withdrew to consider further the status of the cottage. It was only after receiving information that the cottage was the business premises of the taxpayer and observing various persons removing property from the cottage, that the agents reentered the cottage and seized its contents. Thus, the agents fully adhered to the instructions in the Internal Revenue Service Manual which prohibit forcible entry into personal residences (see Appendix B, *infra*, pp. 11a-14a). Moreover, during all stages of this collection effort, the agents discussed their actions with the Regional Counsel of the Internal Revenue Service.[41]

[41] In *See*, the Court recognized that physical force might be used "within the framework of a warrant procedure" to gain entry to commercial premises (387 U.S. at 545). Since Section 6331 authorizes a levy and seizure without a warrant, the use of minimal force to gain entry to petitioner's business premises is consistent with *See*.

Finally, the agents' seizure of the books and records from petitioner's business premises did not render the levy unreasonable. When collection agents execute a levy and seizure, they are required by Section 6331 to "levy upon all property and rights to property * * * belonging to such person or on which there is a lien * * *." Since the books belonged either to petitioner, which was an alter ego of the taxpayer, or to the taxpayer himself, they were subject to seizure. As the agents testified (A. 24, 25, 60, 87-88), they seized these records in order to ascertain whether they contained any valuable assets themselves (such as stock certificates) or any information concerning the location of other assets of the taxpayer (see Pet. App. A-3).

As we discuss in greater detail at pp. 76-79, *infra*, the Court need not reach the general issue of the validity of the seizure of the books and records or the specific question whether the warrantless inspection of the books and records violated the Fourth Amendment because the Service returned the originals, destroyed its photocopies, and made no use of any information obtained from the documents. The propriety of such a seizure and ensuing "search" may best be resolved in a case in which the Internal Revenue Service continues to hold the records or makes evidentiary use of the seized records.

At all events, we suggest that such an examination is an appropriate incident of the levy power if there is a reasonable basis to believe that the records will disclose the existence of other assets of the

taxpayer. Cf. Section 6333, which authorizes the Service to demand the production of any books and records containing evidence relating to property subject to levy. If the seizure of the books and records was an appropriate and lawful exercise of the levy, the Service could examine those documents and use whatever information it obtained from them. See *Abel* v. *United States*, *supra*, 362 U.S. at 238; *Davis* v. *United States*, *supra*, 328 U.S. at 590.

2. The use of reasonable force in gaining entry to private premises does not *per se* violate the Fourth Amendment. *Miller* v. *United States*, 357 U.S. 301; *Sabbath* v. *United States*, 391 U.S. 585. See also *Semayne's Case*, *supra*, 3 Coke's Rep. (Fraser ed.), Part V, fol. 91a, 77 Eng. Rep. 194 (1604).

Here, the agents engaged a locksmith to open the door as the only feasible and nondestructive means of gaining entry to seize the property contained therein that they reasonably believed to belong to Norman. The agents' conduct was reasonable and the force they employed was the minimum necessary to perform their statutory duty of collecting delinquent taxes. See ALI, Restatement of the Law of Torts 2d, *supra*, § 208, comments *g* and *i*.

In sum, we submit that the reasonableness of each levy and seizure of a delinquent taxpayer's property conducted pursuant to 26 U.S.C. 6331 must be tested on its facts. The seizure may be overturned only if the agents have exceeded the bounds of their authority in the amount and type of force used. There is no showing that the agents acted arbitrarily in this

case or otherwise conducted themselves unreasonably in seizing the taxpayer's property from petitioner. Thus, the agents satisfied the requirement of reasonableness of the Fourth Amendment.

II. At All Events, Petitioner Is Not Entitled To The Relief It Seeks

The previous arguments have demonstrated that: (1) the Fourth Amendment does not require a warrant for the otherwise reasonable levy and seizure of a delinquent taxpayer's property from business premises or public streets and (2) the agents' conduct in executing the levy and seizure in this case was reasonable. Because the court of appeals upheld the validity of the levy and seizure, it did not reach the question of petitioner's requested relief, and there is no reason for this Court to do so either. But however the Court decides the Fourth Amendment issues, petitioner is not entitled to the relief it seeks. Thus, at all events, the court of appeals correctly reversed the judgment of the district court even if its Fourth Amendment holding was in error.

Petitioner's second amended complaint contained the following specific prayers for relief (A. 123-124):

A. Petitioner sought an order directing the revenue agents to return or destroy any photocopies of its books and records seized from its business premises (A. 123).[42] We are advised by the Internal Rev-

[42] By the time petitioner had filed its second amended complaint, the Service had returned the originals of the documents (A. 122).

enue Service that it had done so prior to its appeal of the district court's judgment in the court of appeals. This aspect of petitioner's requested relief is therefore moot.[43]

B. Petitioner further requested the district court to order the revenue agents to return the automobiles that they levied upon and seized (A. 123). However, even assuming the invalidity of the levies, the government now holds the automobiles lawfully pursuant to the judgment of the court of appeals which ordered the government's liens foreclosed in accordance with its counterclaim against petitioner (Pet. App. A-12 to A-13). Thus, the effect of the court of appeals' judgment was to transfer the ownership of the automobiles to the United States. See Section 7403(c) of the Code. That court upheld the Service's determination that petitioner was the alter ego of the taxpayer Norman so that the automobiles held in the name of petitioner in fact belonged to Norman. It is well settled that the exercise of the government's superior property interest in the auto-

[43] After the briefs were filed in the court of appeals, government counsel first learned that the Federal Bureau of Investigation had made copies of several of the documents seized from petitioner's business premises. These documents included a Christmas list of the taxpayer and an address list of various business associates, which the Bureau apparently used in order to attempt to discover his whereabouts after he had become a fugitive from justice. The government advised the court of appeals that the Bureau had agreed to destroy the photocopies in its possession. We are advised by the Bureau that it has destroyed these photocopies.

mobiles by virtue of the foreclosure of its tax lien does not violate the Fourth Amendment. See, *e.g.*, *Cancino* v. *United States*, 451 F.2d 1028, 1033 (Ct. Cl.); *Ginsberg* v. *United States*, 408 F.2d 1016, 1017 n. 1 (C.A. 9); *Field* v. *United States*, 263 F.2d 758, 762 (C.A. 5), certiorari denied, 360 U.S. 918; *Carlo* v. *United States*, 286 F.2d 841, 848-849 (C.A. 2), certiorari denied, 366 U.S. 944; *Welsh* v. *United States*, 220 F.2d 200, 202-203 (C.A.D.C.)." The theory of these cases is that even if property is seized in violation of the Fourth Amendment, the subsequent imposition of a federal tax lien upon such property (and its foreclosure by court judgment) does not violate the Fourth Amendment. Indeed, if the automobiles were returned to petitioner, the existence of the outstanding assessments would subject them to immediate re-seizure. Under these circumstances, petitioner is not entitled to a return of the automobiles even if they were illegally seized.

C. Petitioner also sought an order suppressing all evidence obtained from the seized books and records and an order forever barring the agents from obtaining such evidence by any means (A. 123). As we have pointed out in our brief in *United States* v. *Janis*, No. 74-958, argued December 8, 1975, there

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[44] Petitioner also asked the district court for an order declaring that it was not the alter ego of Norman (A. 123). The court of appeals held that petitioner was such an alter ego (Pet. App. A-6 to A-8) and this Court denied certiorari insofar as the petition sought review of that question (A. 14).

are circumstances in which the exclusionary rule would be an inappropriate sanction in civil tax cases, especially where, as here, there was no evidence that the agents acted maliciously (see Pet. App. A-9) or that they did anything other than follow accepted Internal Revenue Service practices and procedures. But quite apart from that question, the suppression sought by petitioner is premature.

There are no proceedings presently pending or contemplated in which the government intends to use any information from the documents seized from petitioner. But if proceedings eventually arise in which the government attempts to use the documents or information from the documents seized from petitioner's business premises, petitioner or other persons involved may then seek to suppress such evidence. Until that time, suppression is premature. See, *e.g.*, *Meister* v. *United States*, 397 F.2d 268, 269 (C.A. 3); *Hill* v. *United States*, 346 F.2d 175, 178 (C.A. 9); *Roberts* v. *United States*, 363 F. Supp. 37, 38-39 (C.D. Cal.); *Chakejian* v. *Trout*, 295 F. Supp. 97, 102-103 (E.D. Pa).[45]

D. Petitioner further requested an order suppressing as evidence the seizure of the automobiles and barring forever their further seizure (A. 124). As-

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[45] Moreover, petitioner has not demonstrated the irreparable injury required to support a motion to suppress evidence on equitable grounds in advance of any proceeding under Rule 41(e) of the Federal Rules of Criminal Procedure. See *Hunsucker* v. *Phinney*, 497 F.2d 29, 34 (C.A. 5), certiorari denied, 420 U.S. 927; *Centracchio* v. *Garrity*, 198 F.2d 382, 386 (C.A. 1), certiorari denied, 344 U.S. 866.

suming *arguendo* that the automobiles have some evidentiary value, petitioner's suppression request is likewise premature. Moreover, even assuming the invalidity of the Service's original levy on the automobiles, the Anti-Injunction Act, 26 U.S.C. 7421(a), which forbids suits to restrain the assessment or collection of any tax, would prohibit the district court from barring the Internal Revenue Service from levying upon the automobiles.[46]

E. Finally, petitioner sought general and punitive monetary damages against the individual revenue agents who conducted the levy against its property (A. 124). In support of its claim, petitioner relies (Br. 34-35) upon *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388. In that case, the Court held that there is a federal cause of action under the Fourth Amendment for damages upon proof of injuries resulting from federal agents' violation of that Amendment, but reserved the question whether federal officials have an absolute immunity. Cf. *Scheuer* v. *Rhodes*, 416 U.S. 232.

Even assuming *arguendo* the agents' conduct violated the Fourth Amendment, petitioner would not be entitled to money damages if the agents acted in good faith. The court of appeals held that there was no evidence that Agent Clayton's conduct was malicious (Pet. App. A-9). Moreover, the good faith of

[46] Petitioner's request for an order releasing all levies on its property appears (A. 124) to be based on its contention that it was not an alter ego of Norman. That issue, as we have pointed out (see n. 14, *supra*), is not before the Court.

all the agents is reinforced by the apparent fact that their conduct was in conformity with standard Internal Revenue Service procedures which are based upon this Court's decision in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, *supra*. Indeed, the court of appeals unanimously held that the levy and seizure did not violate the Fourth Amendment. Thus, that court implicitly concluded that the agents' conduct met the reasonableness standard of that constitutional provision and that they therefore acted in good faith.

Because the court of appeals held that the levy and seizure did not violate the Fourth Amendment, it had no occasion to consider the validity of a good faith defense. However, if this Court holds that the levy was an unreasonable search and seizure, we believe that the record nevertheless supports the conclusion that the agents acted in good faith. They are accordingly not liable for any damages.[47]

[47] Petitioner's principal damage claim is premised upon the alleged loss of revenue arising from the seizure of the automobiles (A. 121). Thus, even if the Court were to conclude that only the seizure of the documents violated the Fourth Amendment, petitioner would not be entitled to any damages because the record contains no proof of any injury to petitioner resulting from the temporary seizure of its documents.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

STUART A. SMITH,
Assistant to the Solicitor General.

LEONARD J. HENZKE, JR.,
STEPHEN M. GELBER,
Attorneys.

MAY 1976.

APPENDIX A

Constitution of the United States:

Article I.

* * * * *

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * * *

Amendment to the Constitution of the United States:

Article IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Internal Revenue Code of 1954 (26 U.S.C):

SEC. 6212. NOTICE OF DEFICIENCY.

(a) [as amended by Sec. 89(b), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, 1665, and Sec. 101(j)(40), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487, 530] *In General.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 42, he is authorized to send notice of such de-

ficiency to the taxpayer by certified mail or registered mail.

* * * * *

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) [as amended by Sec. 101(j)(42), Tax Reform Act of 1969, *supra*] *Time for Filing Petition and Restriction on Assessment.*—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421 (a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

(c) *Failure To File Petition.*—If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary or his delegate.

* * * * *

SEC. 6215. ASSESSMENT OF DEFICIENCY FOUND BY TAX COURT.

(a) *General Rule.*—If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the Secretary or his delegate. No part of the amount determined as a deficiency by the Secretary or his delegate but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by levy or by proceeding in court with or without assessment.

* * * * *

SEC. 6301. COLLECTION AUTHORITY.

The Secretary or his delegate shall collect the taxes imposed by the internal revenue laws.

SEC. 6303. NOTICE AND DEMAND FOR TAX.

(a) *General Rule.*—Where it is not otherwise provided by this title, the Secretary or his delegate shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to

each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

(b) *Assessment Prior to Last Date for Payment.*—Except where the Secretary or his delegate believes collection would be jeopardized by delay, if any tax is assessed prior to the last date prescribed for payment of such tax, payment of such tax shall not be demanded under subsection (a) until after such date.

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6322 [as amended by Sec. 113(a), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125, 1146] PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6323 [as amended by Sec. 101(a), Federal Tax Lien Act of 1966, *supra*]. VALIDITY AND PRIORITY AGAINST CERTAIN PERSONS.

(a) *Purchasers, Holders of Security Interests, Mechanic's Lienors, and Judgment Lien Creditors.*—The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate.

* * * * *

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collec-

tion of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) [as amended by Sec. 104(a), Federal Tax Lien Act of 1966, *supra*] *Seizure and Sale of Property.*—The term "levy as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

* * * * *

SEC. 6333. PRODUCTION OF BOOKS.

If a levy has been made or is about to be made on any property, or right to property, any person having custody or control of any books or records, containing evidence or statements relating to the property or right to property subject to levy, shall, upon demand of the Secretary or his delegate, exhibit such books or records to the Secretary or his delegate.

SEC. 6335. SALE OF SEIZED PROPERTY.

(a) *Notice of Seizure.*—As soon as practicable after seizure of property, notice in writing shall be given by the Secretary or his delegate to the owner of the property (or, in the case of personal property, the possessor thereof), or

shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

* * * * *

SEC. 6861. JEOPARDY ASSESSMENTS OF INCOME, ESTATE, AND GIFT TAXES.

(a) *Authority for Making.*—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213 (a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

(b) *Deficiency Letters.*—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment.

* * * * *

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

* * * * *

SEC. 7426 [as added by Sec. 110(a), Federal Tax Lien Act of 1966, *supra*] CIVIL ACTIONS BY PERSONS OTHER THAN TAXPAYERS.

(a) *Actions Permitted.*—

(1) *Wrongful levy.*—If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such

property has been surrendered to or sold by the Secretary or his delegate.

* * * *

(b) *Adjudication.*—The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) *Injunction.*—If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

(2) *Recovery of property.*—If the court determines that such property has been wrongfully levied upon, the court may—

(A) order the return of specific property if the United States is in possession of such property;

(B) grant a judgment for the amount of money levied upon; or

(C) grant a judgment for an amount not exceeding the amount received by the United States from the sale of such property.

For the purposes of subparagraph (C), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount equal to the minimum price determined pursuant to such

section or (if larger) the amount received by the United States from the resale of such property.

* * * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

* * * * *

APPENDIX B

Internal Revenue Service Manual:

5341 General

* * * * *

(11) A Revenue Officer is not authorized to use force in the seizure of property. Thus, if the taxpayer or any other person bars the path or approach of the Revenue Officer and clearly indicates that he will use force in attempting to prevent the seizure, the Revenue Officer should withdraw and report the matter to his Group Manager.

(12) If the Revenue Officer is in the process of actually seizing the property and is physically attacked to prevent completion of the seizure and the attack continues even though the Revenue Officer discontinues the seizure, the Revenue Officer may use such force as is necessary to protect himself and stop the attack. *Also see IRM 5146.* However, excessive force should not be used by the Revenue Officer as it often becomes a close question as to when self-defense ends. Excessive force may possibly subject the Revenue Officer to proceedings for assault and battery under State law. *See LRG 835.3.*

(13) Generally, a Revenue Officer has the right to enter onto public or private premises in order to carry out his official duties. However, several qualifications or precautions, depending upon ownership and type of premises involved, should be observed.

(a) If the premises consist of a private residence owned by the taxpayer, the Revenue

Officer has the authority to enter onto the premises in the normal manner and to seek an interview with the taxpayer. He can also request permission to examine and seize whatever personal property that may be inside the residence. However, if the Revenue Officer is denied entrance, he has no authority to enter the residence. *The Revenue Officer should not attempt any entrance unless the taxpayer or another adult gives him specific permission.* If, thereafter, the Revenue Officer is requested to leave the residence, he should immediately comply.

(b) If personal property is located outside the residence but still on the private premises of the taxpayer, the Revenue Officer has authority to enter onto the premises and seize the personal property. The Revenue Officer may proceed to seize the property even though requested or demanded to leave the premises. However, if force or violence is used or threatened, the Revenue Officer should withdraw from the premises and report to his Group Manager as outlined in (11) above.

(c) If the premises are owned by a third party and the taxpayer is a leasee, for example, the operator of a business on the premises, the Revenue Officer has authority to enter the place of business and seize personal property located on the premises where the business operation of the taxpayer is being conducted.

(14) A Revenue Officer should not physically seize property from the person of the taxpayer or from the person of any other party against the individual's will. Seizure of property from the person of an individual can only

be made by voluntary compliance with a request from the Revenue Officer to the individual having possession of the property.

(15) A search warrant cannot be issued to a Revenue Officer authorizing entry upon private premises to search for property to be seized for distraint purposes. *Rule 41 of the Federal Rules of Criminal Procedure (Title 18 U.S.C.) is the sole authority for the issuance, execution, and return of federal search warrants.* That rule only authorizes issuance of warrants to search for and seize property stolen or embezzled in violation of the laws of the United States, designed or intended for use or which is or has been used as the means of committing a criminal offense, or possessed, controlled or designed or intended for use or which is or has been used in violation of Title 18, U.S.C. 957 (possession of property in aid of foreign government).

(16) In making the seizure, warning notices, Publication 34, or seizure tags, Publication 180, will be signed by the Revenue Officer and attached to the property being seized. If the taxpayer's entire business is under seizure, it will not be necessary to attach a warning notice to each item; however, a sufficient number of notices should be attached to clearly identify the property under seizure. After attaching the warning notices, the Revenue Officer should begin to inventory the property under seizure. *See IRM 5352:(4) for delay, under certain circumstances, in taking an immediate inventory.*

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MANUAL 53G-39

SUPPLEMENT

DEPARTMENT OF THE TREASURY

Internal Revenue Service

November 24, 1975

Seizure of Assets—Revenue Officer's Right to Enter Onto Public or Private Premises

Section 1. Purpose

This Supplement provides guidance on the extent to which a Revenue Officer can go to gain entry to a taxpayer's premises in an effort to seize assets located thereon.

Section 2. Background

Recently, two questions have arisen concerning the above subject. The first is whether in the process of seizing assets, a Revenue Officer may legally remove and replace the lock assembly of the door to a taxpayer's premises. The second question is whether a Revenue Officer can force entry through a door to a multiple unit building to reach a taxpayer's assets if the taxpayer neither owns nor leases the entire building.

Section 3. Procedures

.01 If the premises being seized are the taxpayer's personal residence, the taxpayer's approval must be obtained before a Revenue Officer can legally change the lock assembly of the door to those premises.

.02 If the premises being seized are *not* the personal residence of the taxpayer, the Revenue Officer may, with or without approval of the taxpayer, change the lock assembly provided that no "physical force" is used. Physical force in this context means any "physical effort against a *person*."

.03 When the taxpayer's assets are on premises that are located within a multiple unit bulding which is neither owned nor leased by the taxpayer, the locks on the entrance(s) to the multiple unit building cannot be changed without the owner's permission. The Revenue Officer will not force entry into the building to reach the taxpayer's assets. Permission to enter without the use of force should be requested from the owner. If the owner's consent cannot be obtained, the matter should be referred to Regional Counsel for advice.

Section 4. Effect on Other Documents

This supplements IRM 5340. This "effect" should be annotated by pen and ink on the text cited, with a reference to this Supplement.

/s/ Thomas L. Davis
THOMAS L. DAVIS
Director, Collection Division

APPENDIX C

MARCH TERM—MAY 1, 1975

Before Honorable Delmas C. Hill, Honorable Oliver Seth and Honorable James E. Barrett, United States Circuit Judges

No. 74-1436

(D.C. #C-189-73)

G. M. LEASING CORP., PLAINTIFF-APPELLEE

vs.

THE UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, ROLAND V. WISE, District Director, JAMES M. LIVSEY, JOHN W. HAACKE, GLENN S. HILTON, KEITH E. FINLEY, JR., CLARK D. HOLFELTZ, JOSEPH J. WHITE, CLESSE S. HILTON, BURT C. APPLEGATE, RONALD P. HARRINGTON, TIM W. ELISON, LAWNIE C. MAYHEW, THOMAS L. HARKNESS and PHILIP J. CLAYTON, DEFENDANTS-APPELLANTS

GEORGE I. NORMAN, III, INTERVENOR

This cause came on to be heard on the record on appeal from the United States District Court for the District of Utah, and was argued by counsel.

Upon consideration whereof, it is ordered the judgment of that court is affirmed only insofar as it orders the 7000 shares of Emdeko stock returned to intervenor. The judgment is in all other respects reversed. The United States District Court for the District of Utah is directed to enter judgment in

favor of the appellants and against appellee and intervenor accordingly.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX D

May Term—June 17, 1975

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

No. 74-1436

G. M. LEASING CORP., PLAINTIFF-APPELLEE

v.

THE UNITED STATES OF AMERICA, et al.,
DEFENDANTS-APPELLANTS

v.

GEORGE I. NORMAN, III, INTERVENOR

This matter comes on for consideration of the Petition for Rehearing and Suggestion for Rehearing En Banc filed by the Appellee in the captioned case.

Upon consideration whereof, the Petition for Rehearing is denied by Circuit Judges Hill, Seth, and Barrett, to whom the case was argued and submitted.

The Petition for Rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on Rehearing En Banc, Rule 35, Federal Rules of Appellate Proce-

dure, the Suggestion for Rehearing En Banc is denied.

HOWARD K. PHILLIPS
Clerk

By: /s/ Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

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